No. 9746

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2269

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 60-8-28-41

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
In and for the Southern District of California
Central Division

No. 433-J Civil

J. LESLIE MORRIS COMPANY, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR RECOVERY OF INTERNAL REVENUE TAX AND INTEREST

Comes now the plaintiff in the above entitled action and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff, J. Leslie Morris Company, Inc., at all times herein mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City of Los Angeles, County of Los Angeles, State of California. Said principal place of business is located within the Sixth Collection District of California.

II.

That one Nat Rogan was on, to-wit: July 30, 1935, and prior thereto, and thence continuously up to

and including the date of the filing of this complaint, collector of Internal Revenue of the United States for the Sixth District of California.

III.

That the tax and interest involved herein arises under the laws of the United States providing for internal revenue and more specifically under Section 606 (c) of the Internal Revenue Act of 1932. That all of the taxes and interest sued for herein were assessed and imposed in respect of sales by plaintiff of [2] rebabbitted automobile connecting rods during the period from June 21, 1922, to August 1, 1935. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiff, and before their acquisition by plaintiff, had been used as operating parts for automobile motors, and by reason of such use the babbitt metal lining constituting a part of said connecting rods had become worn, chipped, roughened and otherwise impaired.

IV.

That none of the articles sold by this plaintiff, on which the tax sued for herein was assessed and paid, were manufactured or produced or imported by said plaintiff; that plaintiff is, and at all times herein mentioned was, engaged in the business of repairing and rebabbitting worn and damaged automobile connecting rods; that the process used was only a repair and did not change the identity of

the parts in any manner, as trade-names and model numbers appearing thereon were not altered or removed; that all repaired connecting rods were packed in cartons clearly marked to indicate that the parts had only been rebabbitted and repaired.

V.

That on or about the 15th day of November, 1935, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department, and the Collector of Internal Revenue for the Sixth District of California, determined that there were due from plaintiff, pursuant to the provisions of Section 606(c) of the Internal Revenue Act of 1932, certain excise taxes together with interest thereon, upon the sale by plaintiff or rebabbitted automobile connecting rods, in the sum of $6,800.59; and pursuant to such determination the defendant assessed said taxes and interest, or caused the same to be assessed against the plaintiff, and the Collector of Internal Revenue for the Sixth District of [3] California made demand upon plaintiff for the payment of said taxes and interest.

VI.

That pursuant to the aforesaid demand the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of $500.00, on or about the 1st day of September, 1937.

VII.

That Section 606(c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of rebabbitted and repaired automobile connecting rods, and therefore, the assessment heretofore alleged is illegal and void. Accordingly, on or about the 18th day of November, 1937, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said $500.00, representing tax and interest paid under provisions of Section 606(c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on Official Form Number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

"Commissioner of Internal Revenue,
Washington, D. C.
Sir:

Re: J. Leslie Morris Co., Inc.
1361 S. Hope Street,
Los Angeles, Calif.

Under account number Nov. 36 Misc 2027-1 your office assessed $6800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932,

to August 1, 1935. On September 1, 1937, this taxpayer made a payment of $500.00 on said assessment.

The above payment of $500.00 represents a payment by this taxpayer on the liability as established by the [4] commissioner's office. This tax has not been passed on to the purchaser in any manner, either by separate billing or by a raise in prices.

The J. Leslie Morris Co., Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article is packed in a carton marked 're-babbitted' and bearing the statement 'Our famous spinning process used in repairing this connecting rod'. This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage bat-

teries, automobile engines and upon the following rulings and decisions:

S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, in the sale of his product, took in part payment trucks of his own make, some of which were repaired by replacing unserviceable parts by new parts, that no tax would attach to the sale thereof under section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a [5] chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

This policy was continued with reference to used motorcycles by a ruling published in 1932. (S. T. 514, C. B. December 1932, p. 471):

> "Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by

section 606 (b) of the Internal Revenue Act of 1932.'' '

''In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule.

(S. T. 648, C. B. June 1933, p. 384):

' ''The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.'' '

''This rule was extended by J. C. Skinner vs. United States to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

''This rule was continued by the Federal Court in Montieth Brothers Company vs. United States rendered October 5, 1936 and in Hempy-Cooper Manufacturing Company vs. United States. Both these cases related to the taxability of rebabbitted connecting rods and

rewound armatures. The court found in favor of the plaintiff in both of these cases, and adopted findings which left no doubt as to sale of rebabbitted connecting rods being free of tax. [6]

"Attention is called to a letter to the National Standard Parts Association, Detroit, Mich. over the signature of Mr. D. S. Bliss dated June 30, 1936, in which it was held that no tax attached to the sale or exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that 'repaired connecting rods' were used in the rebuilt engine under consideration.

"In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

"J. LESLIE MORRIS COMPANY, INC.,
By J. LESLIE MORRIS,
President"

VIII.

That on or about the 25th day of March, 1938, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of $500.00.

IX.

That the tax and interest covered by this suit has not been included in the price of the article with respect to which it was imposed, or collected from the vendee or vendees. [7]

For a Second, Several and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

I.

Plaintiff, by reference, hereby makes Paragraphs I, II, III, IV, V, and IX of its first cause of action a part of this cause of action, as if the same were fully set forth herein.

II.

That pursuant to the aforesaid demand the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of $500.00, on or about the 22nd day of April, 1938.

III.

That Section 606 (c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of rebabbitted and repaired automobile connecting rods, and therefore, the assessment heretofore alleged is illegal and void.

Accordingly, on or about the 7th day of June, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said $500.00 representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on Official Form number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

"Commissioner of Internal Revenue
Washington, D. C.
Sir:

Re: J. Leslie Morris Co., Inc.
1361 S. Hope Street,
Los Angeles, Calif.

"Under account number Nov. 36 Misc. 2027-1 your office assessed $6800.59 against the above taxpayer to [8] cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. On April 21, 1938, this taxpayer made a payment of $500.00 on said assessment.

"The above payment of $500.00 represents a payment by this taxpayer on the liability as established by the commissioner's office. This tax has not been passed on to the purchaser in

any manner, either by separate billing or by a raise in prices.

"The J. Leslie Morris Co., Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article is packed in carton marked "re-babbitted" and bearing the statement "Our famous spinning process used in repairing this connecting rod." This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

"It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage batteries, automobile engines and upon the following rulings and decisions:

"S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, [9] in the sale of his prod-

uct, took in part payment trucks of his own make, some of which were repaired by replacing unserviceable parts by new parts, that no tax would attach to the sale thereof under section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

"This policy was continued with reference to used motorcycles by a ruling published in 1932.

(S. T. 514, C.B. December 1932, p. 471):

> " 'Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932.' "

"In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule.

(S. T. 648, C. B. June 1933, p. 384):

" 'The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.' "

"This rule was extended by J. C. Skinner vs. United States to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, [10] and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

"This rule was continued by the Federal Court in Montieth Brothers Company vs. United States rendered October 5, 1936 and in Hempy-Cooper Manufacturing Company vs. United States. Both these cases related to the taxability of rebabbitted connecting rods and rewound armatures. The court found in favor of the plaintiff in both of these cases, and adopted findings which left no doubt as to sale of rebabbitted connecting rods being free of tax.

"Attention is called to a letter to the National Standard Parts Association, Detroit, Mich. over the signature of Mr. D. S. Bliss in

which it was held that no tax attached to the sale or exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that "repaired connecting rods" were used in the rebuilt engine under consideration.

"In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

"J. LESLIE MORRIS
COMPANY, INC.,
"By J. LESLIE MORRIS,
"President." [11]

IV.

That on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of $500.00.

For a Third, Several and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

I.

Plaintiff, by reference, hereby makes Paragraphs I, II, III, IV, V, and IX of its first cause of action a part of this cause of action, as if the same were fully set forth herein.

II.

That pursuant to the aforesaid demand the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of $500.00, on or about the 13th day of August, 1938.

III.

That Section 606 (c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of rebabbitted and repaired automobile connecting rods, and therefore, the assessment heretofore alleged is illegal and void. Accordingly, on or about the 20th day of August, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said $500.00, representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim was duly filed on refund plaintiff alleged and set forth as the grounds Official form number 843; that in said claim for for the refund claimed, as follows, to wit: [12]

"Commissioner of Internal Revenue
Washington, D. C.

Re: J. Leslie Morris Co., Inc.
1361 S. Hope Street,
Los Angeles, California

Sir:

"Under account number Nov. 26 Misc. 2027-1 your office assessed $6,800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods sold during the period from June 21, 1932 to August 1, 1935. On August 9, 1938, this taxpayer made a payment of $500.00 on said assessment.

"The J. Leslie Morris Company is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer and is packed in a carton marked "Re-babbitted" and bearing the statement "Our Famous spinning process used in repairing this connecting rod." This company is well known to the automobile trade as a re-babbitter of connecting rods. They have never manufactured a new rod, and could not do so for the reason that they have not the necessary equipment.

"It is contended that since the re-babbitted connecting rods do not lose their original identity and since the re-babbitting is only a repair,

that no tax should attach upon the sale thereof. Our contention is based on the actual facts and the following Treasury decisions and Court Decisions:

"S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, repaired used trucks by replacing worn parts with new parts, that no tax attached to the sale thereof under [13] section 606 (3) of the Internal Revenue Act of 1924, but that a tax would attach to the sale of the new parts used therein.

"This policy was continued with reference to the sale of used motorcycles by a ruling published in 1932. S. T. 514, C. B. December 1932, P. 471. In this instance the Bureau held:

> " 'Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932.' "

"In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule, S. T. 648, C. B. June, 1933, p. 384.

> " 'The retreading of old tires by resurfacing or replacing of the actual tread down to

the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.' "

"The above rule was followed by the United States District Court in J. C. Skinner v. United States, 8 Federal Supplement 999. In this case the Court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires, that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

"This rule was continued by the Federal District Court in Monteith Brothers Company v. United States, Mempy-Cooper Manufacturing Company v. United States and Pioneer Motor Bearing Company v. United States. [14]

"In view of the foregoing decisions and the fact that the rebabbitting process does not alter the original identity of the connecting rods, it is claimed that no tax is due upon the sale thereof, and that the $500.00 payment referred to above was unjustly and illegally collected and should be refunded.

"J. LESLIE MORRIS
COMPANY, INC.
By J. LESLIE MORRIS,
"President."

IV.

That on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of $500.00.

Wherefore, plaintiff prays for judgment against defendant in the sum of $1,500.00, together with interest thereon, from the dates of the respective payments, at the rate of six per cent per annum, and for such other and further relief as the court deems fitting and proper.

DARIUS F. JOHNSON,
Attorney for Plaintiff. 1124 Van Nuys Building,
Los Angeles, California. [15]

(Verification.)

[Endorsed]: Filed Jun 15, 1939. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [16]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to the Complaint, admits, denies and alleges as follows:

I.

The allegations of Paragraph I of the Complaint are admitted.

II.

The allegations of Paragraph II of the Complaint are admitted.

III.

Answering the allegations of Paragraph III of the Complaint, defendant admits that the tax in controversy arises under Section 606 (c) of the Revenue Act of 1932 and that said taxes were assessed and imposed in respect of automobile connecting rods sold by plaintiff during the period between June 21, 1932, and July 31, 1935, inclusive, but it is denied that said sales were of "rebabbitted automobile connecting rods". It is denied that all or any part of said connecting rods sold by plaintiff were manufactured by any person or [17] persons other than plaintiff. In this connection, it is alleged that the connecting rods sold by plaintiff, or the greater part of them, were connecting rods manufactured and produced by it, within the meaning of the Revenue Statute, from a combination of new materials and usable materials salvaged from discarded, used or worn out connecting rods, or scrap acquired by plaintiff from jobbers and junk dealers; that such used connecting rods as were salvaged and used by the plaintiff in the manufacture of connecting rods sold by it were discarded and junked by their former owners because they were no longer regarded by such owners as serviceable or fit for the purpose to which they were originally put and adapted, and that the remainder of plaintiff's sales of connecting rods consisted of newly manufactured rods purchased by plaintiff from outside sources in instances where used forgings were not yet available, due to the re-

cent advent of particular types or models of rods, and that said newly manufactured rods were sold by plaintiff as its own product and were commingled with the connecting rods produced and manufactured by plaintiff from a combination of new and used materials. All other allegations of Paragraph III are denied.

IV.

Answering Paragraph IV of the Complaint, it is admitted that none of the articles sold by plaintiff were imported by it. All other allegations of said Paragraph IV of Complaint are denied. It is further alleged in this connection that plaintiff at all times material to the issues in this action was engaged chiefly in the business of making and producing automobile connecting rods and selling them under its own trade name therefor throughout the United States, Canada, New Zealand and Australia to wholesalers, known also as jobbers, for replacement purposes in connection with the repairing of automobile motors by mechanics and garage men. [18]

V.

Answering Paragraph V of the Complaint, defendant admits that the Commissioner of Internal Revenue determined that taxes in the aggregate sum of $5,243.49 were due by plaintiff under the provisions of Section 606 of the Revenue Act of 1932, in addition to the original taxes paid by plaintiff in the amounts shown in the monthly excise returns filed by plaintiff with respect to the cash portion of each and every sale of automobile connecting rods made

by it during the taxable period. In this connection, it is alleged that said sum of $5,243.49, together with interest thereon of $1,164.42 and penalties of $392.68, or an aggregate sum of $6,800.59, was duly assessed on the November, 1935 assessment list of the Commissioner of Internal Revenue and that demand for payment of said tax was duly made. That said additional assessment of $5,243.49 was made on the basis that the allowance granted by plaintiff for the serviceable article taken in trade on its sales should be included as part of the sales price in computing the tax. All other allegations of Paragraph V of the Complaint are denied.

VI.

The allegations of Paragraph VI are admitted. In further answer to the allegations of Paragraph VI, defendant alleges that plaintiff has paid on said assessment of $6,800.59 only the sum of $1,500.00 and is still indebted to the United States in the remaining amount of $5,300.59, plus interest.

VII.

Answering the allegations of Paragraph VII of the Complaint, defendant denies the assessment in question is illegal or void. It is admitted that plaintiff filed a claim for the refund of the sum of $500.00 paid on September 1, 1937, on account of the total addi- [19] tional assessment of $6,800.59 and that said claim was filed on Treasury Department Form 843 and recited in support thereof the grounds which are quoted in Paragraph VII of the Complaint. It

is denied that said grounds correctly set forth the facts or are legally sufficient to constitute a claim for refund. It is alleged that the remaining allegations of Paragraph VII are argumentative and require no answer. In further answer to Paragraph VII of the Complaint, it is alleged that plaintiff's purported claim for refund is legally insufficient as a basis for the recovery of said sum of $500.00 because said claim for refund was filed prior to the payment of the entire assessment of $6,800.59 and that the Court is without jurisdiction to grant recovery herein for the reason that plaintiff has failed to comply in said claim, or otherwise, with the provisions of Section 621 (d) of the Revenue Act of 1932 and the Regulations promulgated pursuant thereto.

VIII.

Paragraph VIII of the Complaint is admitted.

IX.

Paragraph IX of the Complaint is denied.

In answer to the plaintiff's alleged second and separate cause of action, defendant admits, denies and alleges as follows:

I.

Answering Paragraph I of said alleged second cause of action, defendant, by reference, hereby adopts the answers made to Paragraphs I, II, III, IV, V and IX of plaintiff's alleged first cause of action with the same force and effect as if said answering paragraphs were again fully set forth. [20]

II.

Paragraph II of the alleged second cause of action is admitted. Further answering Paragraph II of the second cause of action, defendant alleges that plaintiff has paid on said assessment of $6,800.59 only the total sum of $1,500.00 and is still indebted to the United States in the remaining amount of $5,300.59, plus interest.

III.

Answering the allegations of Paragraph III of the alleged second cause of action, defendant denies that the assessment in question is illegal or void. It is admitted that plaintiff filed a claim for refund of the sum of $500.00 paid on April 22, 1938, on account of the total additional assessment of $6,-800.59. That said claim was filed on Treasury Department Form 843 and recited in its support the grounds which are quoted in Paragraph III of said alleged second cause of action of the Company, but it is denied that said grounds correctly set forth the facts or are legally sufficient. It is alleged that the remaining allegations of said Paragraph III of the alleged second cause of action of the Complaint are argumentative and require no answer. In further answer to the allegations of Paragraph III of the alleged second cause of action, defendant alleges that plaintiff's said claim for refund is legally insufficient as a basis for the recovery of said $500.00 because the same was filed prior to the payment of the entire assessment of $6,800.59 and that the Court is without jurisdiction to grant any re-

covery herein because plaintiff has failed to comply in said claim, or otherwise, with the provisions of Section 621(d) of the Revenue Act of 1932 and the Regulations promulgated pursuant thereto.

[21]

IV.

The allegations of Paragraph IV of the alleged second cause of action of the Complaint are admitted.

In answer to plaintiff's alleged third and separate cause of action, defendant admits, denies and alleges as follows:

I.

In answer to Paragraph I of plaintiff's alleged third cause of action, the defendant, by reference, here adopts the answer made to Paragraphs I, II, III, IV, V and IX of the plaintiff's first alleged cause of action with the same force and effect as if said answering paragraphs were again fully set forth.

II.

The allegations of Paragraph II of plaintiff's alleged third cause of action are admitted. In further answer to said Paragraph II of plaintiff's alleged third cause of action, defendant alleges that the plaintiff paid on said assessment of $6,800.59 only the total sum of $1,500.00 and is still indebted to the United States in the remaining amount of $5,300.59, plus interest.

III.

Answering the allegations of Paragraph III of plaintiff's alleged third cause of action, defendant

denies that the assessment in question is illegal or void. It is admitted that plaintiff filed a claim for the refund of $500.00 paid August 13, 1938, on account of the total assessment of $6,800.59; that said claim was filed on Treasury Department Form 843 and recited in support thereof the grounds which are quoted in Paragraph III of said alleged third

[22]

cause of action of plaintiff's Complaint. It is alleged that the remaining allegations of Paragraph III are argumentative and require no answer. In further answer to the allegations of said Paragraph III, defendant alleges that plaintiff's purported claim for refund is legally insufficient as a basis for the recovery of said $500.00 because the same was filed prior to the payment of the entire assessment of $6,800.59. Further answering, the defendant alleges that the said claim for refund is also insufficient because of the failure to allege therein that plaintiff has not included the tax in the price of the articles with respect to which it was imposed, or that plaintiff has not collected the amount of the tax from the vendees, or that it has repaid the amount of the tax to the ultimate purchasers of the articles, or has secured the written consent of such ultimate purchasers to the allowance of the credit or refund as required by Section 621(d) of the Revenue Act of 1932 and Article 71 of Treasury Regulations 46. It is alleged that plaintiff has wholly failed to comply with the requirements of said Article 71 of Treasury Regulations 46 and Section 621(d) of the Revenue Act of 1932 in its claim for

refund, or otherwise, and for that reason the Court is without jurisdiction to grant plaintiff any recovery herein and plaintiff's alleged third cause of action should be dismissed.

IV.

The allegations of Paragraph IV of the alleged third cause of action are admitted.

By way of further answer to plaintiff's Complaint and as a counter-claim, defendant alleges as follows: [23]

I.

That the defendant is a corporate body politic.

II.

That the United States Commissioner of Internal Revenue on his November, 1935 Miscellaneous tax assessment list, page 2027, line 1, determined and assessed an additional tax and interest in the aggregate amount of $6,800.59 against the plaintiff on account and in respect of sales made by plaintiff of automobile connecting rods during the period from June 21, 1932, to and including July 31, 1935.

III.

That on September 1, 1937, plaintiff paid the sum of $500.00 on account of the said additional assessment. Thereafter plaintiff paid the sum of $500.00 on April 22, 1938, and $500.00 on August 13, 1938, and there remains due and unpaid to the defendant from the plaintiff on account of said additional assessment the sum of $5,300.59, together with interest as provided by law.

IV.

That although the Collector of Internal Revenue for the Sixth Collection District of California has, on behalf of the defendant herein, demanded that plaintiff pay the entire amount of said additional assessment, plaintiff has failed, neglected and refused to pay the sum of $5,300.59, plus interest thereon, and is indebted to the defendant in said amount, for which defendant here asserts a counter-claim without, however, waiving the defendant's right to rely upon any of the defenses above set forth in this Answer. [24]

Wherefore, the defendant, having fully answered the plaintiff's Complaint, prays judgment as follows:

I.

That the plaintiff take nothing by this action.

II.

That the defendant have Judgment against the plaintiff herein in the amount of $5,300.59, plus interest according to law, together with defendant's costs expended.

BEN HARRISON, E. H.
United States Attorney.
E. H. MITCHELL, E. H.
Assistant U. S. Attorney.
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed Oct. 16, 1939. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk.

[25]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

I, hereby substitute Darius F. Johnson and Meserve, Mumper and Hughes, as my attorneys in the above entitled matter, in the place and stead of Darius F. Johnson.

Dated: This 23 day of April, 1940.

J. LESLIE MORRIS COMPANY, INC.
By J. LESLIE MORRIS,
President.

I, hereby agree to the substitution of Darius F. Johnson and Meserve, Mumper and Hughes, as the attorneys for the plaintiff, J. Leslie Morris Company, Inc., in the above entitled matter, in my place and stead.

Dated: This 23 day of April, 1940.

DARIUS F. JOHNSON.

[27]

We hereby accept the above substitution of Darius F. Johnson, and Meserve, Mumper and Hughes, as attorneys for the plaintiff, J. Leslie Morris Company, Inc., in the above entitled matter, in the place and stead of Darius F. Johnson.

Dated: This 30th day of April, 1940.

MESERVE, MUMPER and HUGHES,
By SHIRLEY E. MESERVE.

Received copy of the within Substitution of Attys this 6 day of May, 1940.

BEN HARRISON,
U. S. Attorney.
By ARMOND MONROE JEWELL,
Asst. U. S. Atty. Attorney for Deft.

[Endorsed]: Filed May 6, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [28]

At a stated term, to wit: The February Term A. D. 1940 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 24th day of July in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable: Paul J. McCormick, District Judge.

No. 433-M Civil

J. LESLIE MORRIS COMPANY, INC.
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

This cause having come before the Court for trial without a jury on May 28, 1940, and on May

29, 1940, and having been ordered submitted for a decision, and the Court having duly considered the matter, now files its "Conclusions of the Court" and orders as follows:

Upon all the evidence and stipulation in the record, Findings of Fact, Conclusions of Law, and Judgment are ordered for the plaintiff as demanded by the Complaint under the issues of Complaint and Answer, and against the defendant under the issues of the Counterclaim. Attorneys for the plaintiff will prepare, serve, and present the same under the rules within five days from notice hereof. Exceptions allowed defendant. See written Conclusions of the Court filed herein this day. [32]

[Title of District Court and Cause.]

CONCLUSIONS OF THE COURT

McCormick, District Judge:

When consideration is given to the irreconcilable conflict of federal court decisions upon the crucial factual issue in this action, i. e., whether taxpayer in rebabbiting used and damaged connection rods of automobiles is a manufacturer or producer of such parts or accessories, it is indisputable that there is more than doubt as to the meaning of the terms "manufacturer" or "producer" in Section 606 of Revenue Act 1932 and subsection (c) thereof. 47 Stat. at Large, Part 1, pp. 261-262, Title 33 U. S. C. A., Sec. 606.

Under such a record doubts arising under the taxing statute should be resolved against the taxing agency and favorable to the taxpayer. Miller v. Nut Margarine Co., 284 U. S. 498, at page 508; Erskine v. United States, 9 Circuit, 1936, 84 F. 2d 691.

It is only by straining the terms "manufacturer" and "producer" contained in the taxing statute under consideration from their usual, ordinary and normally understood meanings into all-inclusive situations that these terms of doubtful signification can be extended to a service station or processor such as plaintiff taxpayer, whose transactions under consideration in this cause are actually no more than repairing damaged used connecting rods of automobiles and charging for the repair job [33] and service upon delivery of the customer's repaired rod or of another rebabbited second-hand repaired rod. We think no such forced and omnibus meaning of the terms "manufacturer" or "producer" can be fairly attributed to Congress in order to subject the articles sold by the plaintiff to the tax under (c) of Section 606. There is nothing in the statute which intimates that such was the Congressional intent. The decision of the District Court for the Northern District of California in A. P. Bardet, et al., d.b.a. Pioneer Motor Bearing Co. v. United States, No. 20364L, decided May 18, 1938, 384 C. C. H. p. 10,589, wherein the taxpayers suing are competitors of the plaintiff who had engaged in a like process and business of rebabbiting connection rods of automobile engines, as the taxpayer,

and who were held not to be manufacturers under the same statute as here involved, persuades us to conclude that the operations and practices shown by the record before us are neither manufacture nor production of automobile parts within the meaning of subsection (c) of Section 606, Revenue Act 1932.

Our conclusions are also supported by the decision of the District Court (Mo., 1937) in Hempy-Cooper Mfg. Co. v. United States, 19 Am. Fed. Tax Reports 1313, and Con-Rod Exchange, Inc., v. Hendrickson (D. C., W. D. Wash., 1939) 28 F. Supp. 924. These cited tax cases involved rebabbited connecting rods of automobiles, and we think they present situations identical with the record before us in this action.

For the sake of uniformity, if for no other reason, taxpayers identically situated and doing precisely the same thing in relation to tax laws should be treated alike. Our inquiries and investigations have failed to disclose that the government has taken appeal in the cases referred to, and we are therefore justified in assuming that refunds have been made to the respective taxpayers situated as is the plaintiff taxpayer in [34] this action.

We are not unmindful of the decision of the Seventh Circuit Court of Appeals in Clawson & Bals, Inc., v. Harrison, Collector, 108 F. 2d 991, reaching a contrary conclusion as to the meaning of the terms "manufacturer" and "producer" as applied to rebabbiting activities similar to those shown by the record before us. This decision by a

federal appellate court is entitled to and has been given careful study and respectful consideration. We feel, however, that no adequate discussion is to be found in the opinion of the court, differentiating between the broad meaning of the terms in matters of general concern and those relating specifically to tax laws. Such a distinction is supported by eminent authority, and we believe it must be regarded in ascertaining the meaning of tax legislation where the taxing statute itself does not clearly define the meaning of terms contained in it. See Hartramft v. Wiegman, 121 U. S. 609; Kuenzle v. Collector, etc., 32 Philippine 516, and Heacock Co. v. Collector, etc., 37 Philippine 979.

We think the rule of stare decisis is not applicable to the decision of the learned Court of Appeals of the Seventh Circuit. See Continental Securities Co., v. Interborough R. T. Co., 165 Fed. 945, at p. 960.

Inasmuch as our Circuit Court of Appeals has not considered or decided the question under consideration in this action, we are justified in formulating and reaching our own conclusions under the record before us and in the light of other identical situations considered and determined uniformly by the federal courts of the Ninth Circuit. Accordingly, as the plaintiff taxpayer has not passed on the tax to the customer or to anyone, it is entitled to recover the amount illegally collected, and the government is not entitled to anything [35] under its counterclaim.

Findings and judgment are ordered for the plaintiff and against the defendant as prayed under the issues of complaint, answer and counterclaim.

Dated this July 24, 1940.

[Endorsed]: Filed Jul. 24, 1940. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk. [36]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 28th day of May, 1940, at the hour of 10 o'clock A. M. in the above entitled court, the Honorable Paul J. McCormick, Judge, presiding, a jury having been expressly waived. Darius F. Johnson, Esquire and Messrs. Meserve, Mumper & Hughes, appearing for plaintiff and Ben Harrison, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing for the defendant United States of America, and evidence both oral and documentary having been introduced and the court being fully advised in the premises, and the cause having been submitted for decision, the court now makes its findings of fact as follows:

FINDINGS OF FACT

I.

The court finds that the plaintiff, J. Leslie Morris Company, Inc., at all times herein mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the City of Los Angeles, County of Los Angeles, State of California. Said principal place of business is located within the 6th Collection District of California. [37]

That the Articles of Incorporation of plaintiff set forth the following purposes of its incorporation:

> "To own, maintain and operate a business for the manufacture, sale and distribution of automotive and industrial bearing metals and products.
>
> To own, maintain and operate branch plants and offices in the State of California and elsewhere for the manufacture, sale and distribution of such metals and products.
>
> To acquire land, buildings and personal property in the State of California and elsewhere for the purposes of establishing, maintaining and operating such plants and offices as may be necessary for the manufacture, sale and distribution of such metals and products.
>
> To acquire, by purchase, lease or assignment, patents and patent rights bearing on the manufacture of such metals and products.

To acquire, by purchase, lease or assignment, plants or businesses of other persons, firms or corporations for the further development of the business of this corporation, and to acquire and hold shares of stock and bonds of other corporations, and to sell, exchange or otherwise dispose of or trade in such shares and bonds.

To do any and all things necessary to properly carry on the business of the corporation, and to do any and all things necessary or incident to the carrying of the various lines of business in which this corporation may now or hereafter be engaged."

That plaintiff stated in its Capital Stock Tax returns for the years 1933, 1934 and 1935, in answer to the question: "Nature of [38] Business in Detail", as follows: (1933) "Manufacture motor bearings"; (1934) "Rebabbitting Connecting Rods"; and (1935) "Rebabbitting Connecting Rods". That plaintiff stated in its Corporation Franchise Tax returns for the years 1932, 1933 and 1934, in answer to the question "Kind of Business", as follows: (1932) "Mfg. Motor Bearings"; (1933) "Mfg. Motor Bearings"; and (1934) "Mfg. Motor Bearings".

II.

The court finds that one Nat Rogan was, to wit, July 30, 1935, and prior thereto, and thence continuously up to and including the date of the filing of plaintiff's complaint, Collector of Internal Rev-

enue of the United States for the 6th District of California.

III.

The court finds that the tax and interest involved herein arises under the laws of the United States providing for internal revenue and more specifically under Section 606 (c) of the Internal Revenue Act of 1932. That all of the taxes and interest sued for herein were assessed and imposed in respect of sales by plaintiff of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. All of said connecting rods were manufactured by persons, firms or corporations other than plaintiff and before their acquisition by plaintiff, had been used as operating parts for automobile motors, and by reason of such use the babbitt metal lining constituting a part of said connection rods had become worn, chipped, roughened and otherwise impaired; except that when plaintiff's stock was low in certain sizes plaintiff would purchase new rods which had never been used from automotive manufacturers or their representatives and sell them to its customers. The percentage of new rods thus sold, however, is very small—less than five (5) per cent.

IV.

The court finds that none of the articles sold by this [39] plaintiff, on which the tax sued for herein was assessed and paid, were manufactured or produced or imported by said plaintiff; that plaintiff is, and at all times herein mentioned was, engaged

in the business of repairing and rebabbitting worn and damaged automobile connecting rods; that the process used was only a repair and did not change the identity of the parts in any manner, trade-names and model numbers appearing thereon were not altered or removed; that all of the connecting rods sold by plaintiff were packed by plaintiff in cartons bearing its trade name, "Moroloy bearing service" and stating, "Rebabbitted Connecting Rods, Centrifugally Cast, Accurately Machined".

It is true that used connecting rods received by plaintiff from automotive jobbers represent about 85% of the rods received by plaintiffs; about 10% are received from commercial accounts and about 5% received from automobile dealers. The rods to be rebabbitted are received in packages containing from one rod to one hundred rods per package; however, the packages average between twenty and sixty rods per package. The shippers deliver them to the plaintiff. The rods are removed from the packages and checked against the packing slips. Any special instructions regarding rebabbitting are removed from the package at this time. About 20% of the rods carry these special specifications, required usually because of undersizes or that the same bushings are to remain.

It is true that the used rods are segregated according to their respective types and any pin bushings are removed. (About ½ the rods have a clamp type shank end and require no pin bushings). They are removed by an arbor press or with a hammer

and chisel. On about ½ of the rods it is necessary to remove the nuts and bolts and use auxiliary nuts and bolts during the process in order that the original nuts and bolts may be used again. A power driven socket wrench is used on all nuts. [40]

It is true that the babbitt is then melted from the bearing end of the rod by placing that end into a solution of molten babbitt. Any remaining babbitt adhering is chipped off with a chisel and the bearing end of the rod is then cleaned with hydrochloric acid. The bearing end of the rod is then dipped into molten tin or solder so that the babbitt when poured will bond to the rod. The nuts are removed using the same power driven socket wrench and steel separators are inserted between the cap and the shank and the nuts and bolts are replaced. Separators keep the cap from adhering to the shank when the babbitt is applied. Model A Ford rods require no separators. Any oil holes in the bearing end of the rod are plugged with asbestos wicking, small corks, or even toothpicks in order to prevent the babbitt from plugging the oil holes during the rebabbitting process.

It is true the bearing end of the rod is inserted into a mould mounted on a revolving spindle at right angle to the axis of the spindle. The rod is then rotated and by means of a hand ladle molten babbitt is poured through an opening in the mold. The centrifugal force spreads it evenly over the inside surface of the bearing end of the rod. On about 25% of the rods, the rebabbitting must be

done by hand. This is accomplished by placing the bearing end of the rod in a stationary mould and after calking, babbitt is poured into the space covering the inside surface of the rod.

It is true the rods are then cleaned by an oakite bath. Steel separators are then removed by means of another power driven socket wrench and any auxiliary nuts and bolts are removed and the originals replaced. A revolving sand paper disk is used to remove adhering particles of babbitt. Two drill presses are used to clean out the oil holes. The rods are then dipped in a rust preventive and hung on a rack to dry. The rods are then placed in a lathe and the babbitt is rough bored, faced and chamfered. The babbitt on about 20% of the rods must be bored to special undersize as ordered; a second lathe [41] is used for this purpose. A hand milling machine is used to cut oil pockets in the babbitt. About 50% of the rods rebabbitted require oil pockets. A slotting tool is used to separate rod and cap on Model A Ford rods. This operation leaves necessary oil grooves in the babbitt. A circular saw is used to notch the babbitt flange. About ½ of the rods require new bushings in the small end of the shank, which are installed by a hand operated arbor press. Approximately 50% of the rods require the babbitt flange to be faced by a special tool placed in a drill press. Model A Ford and 6 cylinder Chevrolet rods require an oil groove on the face of the babbitt bearing which is cut in the shape of a figure 8 by a hand operated grooving machine. Certain

Pontiac bearings require a continuous oil groove around the center of the babbitt, which is cut by a motor driven cutting tool.

It is true all of the rods except the 20% which are finished to special undersize, on the lathe, are finished to standard size by means of a hydraulically operated broaching machine. On Model A Ford rods, it is necessary to use a chamfering tool mounted in a drill press to smooth the very thin pin bushings used in these rods. All rods are then given a final inspection and new nuts and bolts replaced where necessary. The rods are then boxed and ready for shipment.

That plaintiff issued illustrated catalogues containing price lists and advertising and also issued price lists; that both the price lists and the catalogues were issued under the name of "Moroloy Bearing Service" and referred to the rods as "Rebabbitted"; that in the catalogues and price lists plaintiff held itself out to be a company with branches from coast to coast and listed between fourteen and fifteen branches through the United States and Canada. The catalogues referred to these branches in the following statement:

"Service

Fifteen manufacturing branches located at strategic points [42] over the United States and Canada, rendering a coast to coast service, convenient to every jobbing center. Ample stock at all branches assure same day shipment. Tele-

phone and telegraphic orders receive instant attention."

That the invoices of plaintiff bore this title: "Moroloy bearing service, J. Leslie Morris Co., Inc." and under this title were a list of addresses in thirteen different cities in the United States and Canada purporting to be branches.

V

The court finds that on or about the 18th day of November, 1935, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department, and the Collector of Internal Revenue for the Sixth District of California, determined that there were due from plaintiff, pursuant to the provisions of Section 606 (c) of the Internal Revenue Act of 1932, certain excise taxes together with interest thereon, upon the sale by plaintiff of rebabbitted automobile connecting rods, in the sum of $6,800.59; and pursuant to such determination the defendant assessed said taxes and interest, or caused the same to be assessed against the plaintiff, and the Collector of Internal Revenue for the Sixth District of California made demand upon plaintiff for the payment of said taxes and interest.

VI

The court finds that pursuant to the aforesaid demand, the plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of $500.00, on or about the 1st day of September, 1937.

VII

The court finds that on or about the 18th day of November, 1937, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal [43] Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said $500.00, representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on Official Form Number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

"Commissioner of Internal Revenue,
Washington, D. C.

Sir: Re: J. Leslie Morris Co. Inc
1361 S. Hope St.,
Los Angeles, Calif.

Under account number Nov. 36 Misc 2027-1 your office assessed $6,800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. On September 1, 1937, this taxpayer made a payment of $500.00 on said assessment.

The above payment of $500.00 represents a payment by this taxpayer on the liability as

established by the commissioner's office. This tax has not been passed on to the purchaser in any manner, either by separate billing or by a raise in prices.

The J. Leslie Morris Co., Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article is packed in a carton marked "rebabbitted" and bearing the statement "Our famous spinning process used in repairing this connecting rod." This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new [44] rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage batteries, automobile engines and upon the following rulings and decisions:

S. T. 458 C. H. June, 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, in the sale of his products,

took in part payment trucks of his own make, some of which were repaired by replacing unserviceable parts by new parts, that no tax would attach to the sale thereof under Section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

This policy was continued with reference to used motorcycles by a ruling published in 1932. (S. T. 514, C. B. December, 1932, p. 471):

> ' "Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932." '

In a case relating to retreading of automobile tires, [45] published in 1933, the Bureau of Internal Revenue once more applied the same rule. (S. T. 648, C. B. June, 1933, p. 304):

' "The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article." '

This rule was extended by J. C. Skinner vs. United States to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

This rule was continued by the Federal Court in Monteith Brothers Company vs. United States, rendered October 5, 1936, and in Hempy-Cooper Manufacturing Company vs. United States. Both these cases related to the taxability of rebabbitted connecting rods and rewound armatures. The Court found in favor of the plaintiff in both these cases, and adopted findings which left no doubt as to the sale of rebabbitted connecting rods being free of tax.

Attention is called to a letter to the National Standard Parts Association, Detroit Michigan, over the signature of Mr. D. S. Bliss, dated

June 30, 1936, in which it was held that no tax attached to the sale or exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that 'repaired connecting rods' were used in the rebuilt engine [46] under consideration.

In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

J. LESLIE MORRIS COMPANY, INC.,
By J. LESLIE MORRIS,
President."

VIII

The court finds that on or about the 25th day of March, 1938, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of $500.

IX

The court finds that pursuant to the demand of defendant, all as hereinabove set forth, plaintiff

paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of $500 on or about the 22nd day of April, 1938.

X

The court finds that on or about the 7th day of June, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for the refund of said $500.00 representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim for refund was duly filed on official form number 843; that in said claim for refund plaintiff alleged and set [47] forth as the grounds for the refund claimed, as follows, to wit:

"Commissioner of Internal Revenue,
Washington, D. C.
Sir: Re: J. Leslie Morris Company, Inc.,
1361 S. Hope Street
Los Angeles, California.

Under Account Number Nov. 36 Misc. 2027-1 your office assessed $6800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connecting rods during the period from June 21, 1932, to August 1, 1935. On April 21st, 1938, this taxpayer made a payment of $500.00 on said as-

sessment. The above payment of $500.00 represents a payment by this taxpayer on the liability as established by the Commissioner's office. This tax has not been passed on to the purchaser in any manner, either by separate billing or by a raise in prices.

The J. Leslie Morris Company, Inc., is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rods as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer. The finished article was packed in a carton marked "rebabbitted" and bearing the statement "Our famous spinning process used in repairing this connecting rod". This company is well known to the automobile trade as a rebabbitter of rods. They have never manufactured a new rod, and could not do so if they wished for the reason that they have not the equipment which would be necessary to make a new rod.

It is contended that since the rebabbitted connecting rods do not lose their original identities and since the rebabbitting is only a repair process, that no tax should [48] attach upon the sale thereof. This contention is based on the rulings pertaining to the rebuilding of storage batteries, automobile engines and upon the following rulings and decisions:

S. T. 458 C. B. June 1925, p. 265. This ruling held that where the manufacturer of automobile truck chassis in the sale of his product, took in part payment trucks of his own make, some of which were repaired by replacing unserviceable parts by new parts, that no tax would attach to the sale thereof under Section 600 (3) of the Internal Revenue Act of 1924, but that a tax was due on the sale of the new parts used in the repairing of the old trucks. Some used Chassis were dismantled and usable parts were used in the manufacture of truck chassis, together with other salvaged parts and new parts, producing a chassis which had no previous existence. Only in the latter instance would tax attach to the sale.

This policy was continued with reference to used motorcycles by a ruling published in 1932. (S. T. 514, C. B. Dec. 1932, p. 471):

> 'Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not taxable because it is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by Section 606 (b) of the Internal Revenue Act of 1932.'

In a case relating to retreading of automobile tires published in 1933, The Bureau of Inter-

nal Revenue once more applied the same rule. (S. T. 648 C. B. p. 384):

> 'The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.' [49]

This rule was extended by J. C. Skinner v. United States to exclude all retreaded tires from this tax. In this case the court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

This rule was continued by the Federal Court in Montieth Bros. Company vs. United States rendered October 5, 1936, and in Hempy-Cooper Manufacturing Company v. United States. Both these cases related to the taxability of rebabbitted connecting rods and rewound armatures. The court found in favor of the plaintiff in both of these cases, and adopted findings which left no doubt as to the sale of rebabbitted connecting rods being free of tax.

Attention is called to a letter to the National Standard Parts Association, Detroit, Mich., over the signature of Mr. D. S. Bliss in which it was held no tax attached to the sale of exchange of rebuilt automobile engines, even though many new parts were used. Apparently it was presumed that all the parts had been purchased tax paid. In this letter Mr. Bliss mentioned that 'repaired connecting rods' were used in the rebuilt engine under consideration.

In view of the foregoing rulings and court decisions it is impossible to reconcile the action of the Bureau of Internal Revenue in holding that the sale of rebabbitted [50] connecting rods is subject to tax. The intent of the above authorities is very clear and leaves no doubt as to the law applicable in the instant case. Accordingly, taxpayer claims that the tax referred to heretofore was unjustly and illegally collected and should be refunded.

J. LESLIE MORRIS COMPANY, INC.
By J. LESLIE MORRIS,
President."

XI

The court finds that on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim of $500.00.

XII

The court finds that pursuant to the demand of defendant, all as hereinabove set forth, plaintiff paid to the Collector of Internal Revenue of the United States for the Sixth District of California, the sum of $500 on or about the 13th day of August, 1938.

XIII

The Court finds that on or about the 20th day of August, 1938, in accordance with the provisions of the Internal Revenue Act of 1932, the plaintiff duly filed with the Collector of Internal Revenue of the United States for the Sixth District of California, at his office in the City of Los Angeles, State of California, a claim for refund of said $500.00, representing tax and interest paid under provisions of Section 606 (c) of the Internal Revenue Act of 1932; that said claim was duly filed on official form number 843; that in said claim for refund plaintiff alleged and set forth as the grounds for the refund claimed, as follows, to wit:

"Commissioner of Internal Revenue,
Washington, D. C.

Re: J. Leslie Morris Co., Inc.,
1361 S. Hope St.
Dear Sir: Los Angeles, Calif. [51]

Under account number Nov. 26 Misc. 2027-1 your office assessed $6,800.59 against the above taxpayer to cover the manufacturer's excise tax on the sale of rebabbitted automobile connect-

ing rods sold during the period from June 21, 1932 to August 1, 1935. On August 9, 1938, this taxpayer made a payment of $500.00 on said assessment.

The J. Leslie Morris Company is engaged in the business of rebabbitting worn automobile connecting rods. The process is only a repair and does not alter the identity of the rod as established by the manufacturer. The finished article is clearly marked to show that the repair work was done by this taxpayer and is packed in a carton marked "Re-Babbitted" and bearing the statement "Our famous spinning process used in repairing this connecting rod." This Company is well known to the automobile trade as re-babbitter of connecting rods. They have never manufactured a new rod, and could not do so for the reason that they have not the necessary equipment.

It is contended that since the rebabbitted connecting rods do not lose their original identity and since the rebabbitting is only a repair, that no tax should attach upon the sale thereof. Our contention is based on the actual facts and the following Treasury decisions and Court decisions:

S. T. 458 C. B. June 1925, p. 253. This ruling held that where the manufacturer of automobile truck chassis, repaired used trucks by replacing worn parts with new parts, that no tax attached to the sale thereof under section 606

(3) of the Internal Revenue Act of 1924, but that a tax would attach to the sale of the new parts used therein.

This policy was continued with reference to the sale of used motorcycles by a ruling published in 1932. S. T. 514, [52] C. B. December 1932, p. 471. In this instance the Bureau held:

> 'Where manufacturer A accepts as a trade-in a used motorcycle made by manufacturer B, the resale by manufacturer A is not a sale by the manufacturer, producer or importer. However, in the event that used motorcycles are so materially changed before being resold as to lose their original identity, the resale of such machine is subject to the tax imposed by section 606 (b) of the Internal Revenue Act of 1932.'

In a case relating to retreading of automobile tires, published in 1933, the Bureau of Internal Revenue once more applied the same rule. S. T. 648, C. B. June 1933, page 384.

> 'The retreading of old tires by resurfacing or replacing of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article.'

The above rule was followed by the United States District Court in J. C. Skinner v. United States, Federal Supplement 999. In this case the

Court said that retreaded tires were known to the automobile trade for many years prior to the enactment of the Internal Revenue Act of 1932 and that if Congress had intended that the tax should attach to the sale of retreaded tires, that such provision would have been put in the act, and that since such provision was not put in the act it appears that Congress intended for the tax to attach only to the sale of new tires.

This rule was continued by the Federal District Court in Montieth Brothers Company vs. United States, Hempy-Cooper Manufacturing Company vs. United States and Pioneer Motor Bearing Company vs. United States.

In view of the foregoing decisions and the fact that the rebabbitting process does not alter the original identity of the connecting rods, it is claimed that no tax is due upon the sale thereof, and that the $500.00 payment referred to above was unjustly and illegally collected and should be [53] refunded.

J. LESLIE MORRIS COMPANY, INC.
By J. LESLIE MORRIS,
President."

XIV

The court finds that on or about the 7th day of April, 1939, the Commissioner of Internal Revenue of the United States rejected and disallowed plaintiff's said claim for refund of $500.00.

XV

The court finds that the tax and interest covered by this suit has not been added to, or included in the sale price of any of the connecting rods rebabbitted by plaintiff, nor has said tax or interest been collected from the purchasers, either directly or indirectly.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the court concludes as a matter of law, the following:

1. That plaintiff has complied with all statutory requirements constituting conditions precedent to the institution and maintenance of this suit; that plaintiff's claims for refund of tax and each of them, are legally sufficient to constitute a claim for refund; that defendant waived any and all grounds for rejection of plaintiff's claims as set forth hereinabove and each of them, which grounds were not set forth by defendant in its notice of rejection.

2. That the excise tax imposed by Section 606 (c) of the Internal Revenue Act of 1932 does not apply to the sale of used connecting rods by plaintiff which were rebabbitted as hereinbefore set forth.

3. That the process of rebabbitting the used connecting rods by plaintiff as hereinabove set forth, does not constitute manufacturing or production, but is only repair and the plaintiff was not [54] during the time involved in this action, the manufacturer, producer or importer of connecting rods

within the meaning of Section 606 (c) of the Internal Revenue Act of 1932.

4. That Section 606 (c) of the Internal Revenue Act of 1932, does not levy a tax on the sale of used connecting rods rebabbitted as set forth in the within findings of fact and, therefore, the assessment heretofore alleged is illegal and void.

5. That under the evidence and the law, the plaintiff is entitled to a judgment against defendant in the sum of $1500.00.

Judgment is hereby ordered to be entered accordingly.

Dated: August 21st, 1940.

PAUL J. McCORMICK
Judge of the United States
District Court.

Approved as to form in accordance with Rule 8.

ARMAND MONROE JEWELL,
Assistant United States Attorney.

[Endorsed]: Filed Aug. 21, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [55]

In the District Court of the United States Southern District of California, Central Division

No. 433-M—Civil

J. LESLIE MORRIS COMPANY, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 28th day of May, 1940, at the hour of 10 o'clock A.M. in the above entitled court, the Honorable Paul J. McCormick, Judge, presiding, a jury having been expressly waived. Darius F. Johnson, Esquire and Messrs. Meserve, Mumper & Hughes, appearing for plaintiff, and Ben Harrison, United States Attorney, E. H. Mitchell, Assistant United States Attorney, Armond Monroe Jewell, Assistant United States Attorney and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing for the defendant United States of America, and evidence both oral and documentary having been introduced, and the court being fully advised in the premises, and the cause having been submitted for decision, and the court having filed herein its findings of fact and conclusions of law in accordance therewith:

Now therefore, it is hereby ordered, adjudged and decreed that plaintiff have judgment against de-

fendant in the sum of $1500; that defendant recover nothing under its counterclaim.

Dated: August 21st, 1940.

PAUL J. McCORMICK,
Judge of the United States District Court.

Approved as to form in accordance with Rule 8.
ARMOND MONROE JEWELL,
Assistant United States Attorney.

Judgment entered Aug. 21, 1940.
Docketed Aug. 21, 1940.
Book C. O. 3, Page 515.

R. S. ZIMMERMAN,
Clerk.

By B. B. HANSEN,
Deputy.

[Endorsed]: Filed Aug. 21, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk. [56]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above-entitled suit, numbered herein No. 433-M, on the 21st day of August, 1940, in which suit J. Leslie Morris Company, Inc., is plaintiff.

Dated: November 19, 1940.

WM. FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
ARMOND MONROE JEWELL,
Assistant United States Attorney.
By ARMOND MONROE JEWELL,
Attorneys for Defendant.

Copy mailed Nov. 20, 1940, to Darius F. Johnson, Esq., Atty for Plaintiff, 1124 Van Nuys Bldg., Los Angeles, Calif.

R. S. ZIMMERMAN,
Clerk.
By E. L. S.,
Deputy Clerk.

[Endorsed]: Filed Nov 19, 1940. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[57]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET ON APPEAL

Good cause appearing therefor, it is hereby ordered that the defendant appellant may have to and including February 7, 1941, within which to file its record and docket the above-entitled cause on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 18th day of December, 1941.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Dec 18, 1940. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk. [58]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE ON APPEAL

Good cause appearing therefor, it is hereby ordered that the defendant appellant may have to and including February 17, 1941, within which to file its record and docket the above-entitled cause on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 5th day of February, 1941.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Feb. 5, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk. [59]

[Title of District Court and Cause.]

ORDER PERMITTING ORIGINALS TO BE SENT TO CIRCUIT COURT IN LIEU OF COPIES.

Good cause being shown therefor, it is hereby ordered that all of the original papers and exhibits in

the above-entitled case may, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof, and said papers and exhibits may, by designation and stipulation of the parties, become part of the record on appeal in the above-entitled case.

Dated: this 5th day of February, 1941.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Feb. 5, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk. [60]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD ON APPEAL

Pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, it is hereby stipulated by and between the parties hereto, through their respective counsel, that the following shall constitute the record on appeal in the above-entitled case:

1. Complaint.
2. Answer.
3. Notice of transfer of proceedings to Judge McCormick dated September 19, 1939, signed by Clerk.
4. Substitution of attorneys authorized April 23, 1940, and accepted April 30, 1940.
5. The Clerk's minutes of the District Court

dated May 29, 1940, before Honorable Paul J. McCormick.

6. The Clerk's minutes of the District Court dated June 4, 1940, before Honorable Paul J. McCormick.

7. The Clerk's minutes of the District Court dated July 24, 1940, before Honorable Paul J. McCormick.

8. Conclusions of the Court dated July 24, 1940, before Honorable Paul J. McCormick.

9. Findings of fact and conclusions of law signed by Honorable Paul J. McCormick on August 21, 1940. [61]

10. Judgment signed by Honorable Paul J. McCormick on August 21, 1940.

11. Notice of Appeal dated November 19, 1940.

12. Order extending time within which to file record on appeal and docket cause on appeal dated December 18, 1940.

13. Order extending time within which to file record on appeal and docket cause on appeal dated February 5, 1941.

14. Order permitting original papers and exhibits to be sent to the Circuit Court in lieu of copies on appeal dated February 5, 1941.

15. All volumes of the Reporters Transcript in the above-entitled case.

16. The following exhibits: (a) Plaintiff's Exhibits 1 to 64 inclusive; (b) Defendant's Exhibits A to F, inclusive.

17. This Designation of Record On Appeal.

Dated: February 6, 1941.

WILLIAM FLEET PALMER,
United States Attorney.
EDWARD H. MITCHELL,
Assistant United States Attorney.
ARMOND MONROE JEWELL,
Assistant United States Attorney.
By ARMOND MONROE JEWELL,
Attorneys for Defendant & Appellant.
DARIUS F. JOHNSON, and
MESERVE, MUMPER and
HUGHES,
By SHIRLEY E. MESERVE,
Attorneys for Plaintiff & Appellee.

[Endorsed]: Filed Feb 10, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[62]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 62, inclusive, contain full, true and correct copies of the Complaint; Answer to Complaint; Notice of Transfer of Cause to Judge McCormick; Substitution of Attorneys; Minutes of the Court dated May 29, 1940, including Minute Order Submitting Cause; Minute Order dated June 4, 1940, for Submission of Proposed Findings of Fact and Conclusions of Law; Minute Order of July 24, 1940,

for Judgment; Conclusions of the Court; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Two Orders Extending Time to File Record and Docket Cause on Appeal; Order for Transmittal of Original Exhibits to Circuit Court of Appeals; and Stipulation Designating Contents of Record on Appeal; which, together with the original Reporter's Transcript of Proceedings and Testimony, and the original Exhibits, transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court, this 15th day of February, A. D. 1941.

(Seal) R. S. ZIMMERMAN,
Clerk.

By EDMUND L. SMITH,
Deputy Clerk.

[63]

[Title of District Court and Cause.]

TESTIMONY

Appearances:

For the Plaintiff

Darius F. Johnson,
Meserve, Mumper and Hughes.
By Shirley E. Meserve, Esq.,
615 Richfield Building, Los
Angeles, California.

For the Government:

Wm. Fleet Palmer, Acting United
States Attorney.
A. M. Jewell, Assistant United
States Attorney. [64]

Los Angeles, California

Tuesday, May 28, 1940. 10:00 O'Clock A. M.

Mr. Meserve: Has your Honor read the pleadings?

The Court: Yes, I have.

Mr. Meserve: Mr. Jewell, I think probably the best way to present our proof would be by the introduction of the pictures first.

The Court: Is there a dispute of fact as to whether the reconditioning amounted to a reconstruction?

Mr. Meserve: That is the issue.

The Court: There is an issue of fact on that?

Mr. Jewell: No issue of fact of the process particularly because we have worked together and have prepared a group of pictures which will be introduced on behalf of the Plaintiff, which illustrates the process, with a legend upon them. As to whether or not that particular process amounts to mere repair, as the Plaintiff contends, or, as the Government contends, manufacture, is the question before the Court.

The Court: Is the Court to understand that what is the issue is the result of the activity, or what you call the process?

Mr. Jewell: That is correct.

Mr. Meserve: That is correct. That is why I refrained from making an opening statement, because I asked your Honor [65] whether you had read the pleadings. The issue, to my mind, is sim-

ply whether we are taxable under the provisions of Section C 606 of the Revenue Laws. The whole issue, as I view it, is whether the action of the Plaintiff corporation in its business operation constitutes a manufacturing process or whether it is essentially a repair of a mechanical device. In order to present the matter graphically, Mr. Jewell for the Government and ourselves have reviewed a series of photographs, and attached a legend to them to explain the same, in relation to Plaintiff's business, and we intend, of course, to illuminate that by testimony that cannot be covered by either the legend or the picture.

Mr. Jewell, perhaps we can get in the record our stated understanding at our meeting yesterday, and the purpose of these pictures, so we will not be in confusion as to the stipulation.

Mr. Jewell: Do you want me to state my view of it?

Mr. Meserve: You can state your view of it, and if that accords with the way we understood it, it will not have to be stated twice.

Mr. Jewell: It is hereby stipulated that the series of photographs to be introduced on behalf of Plaintiff are true photographs of Plaintiff's business establishment as it now exists, and that the legend appearing beneath each picture constitutes the testimony of Mr. J. Leslie Morris, president of Plaintiff corporation, had he been asked those questions [66] on direct examination.

(The documents referred to was received in

evidence and marked "Plaintiff's Exhibits 1 to 32 Incl.")

[Set Out in Separate Volume.]

Mr. Meserve: That is correct; and is the identification of the photograph.

Mr. Jewell: That is correct.

Mr. Meserve: And for the sake of saving time.

The Court: Very well.

Mr. Meserve: Is that satisfactory to the Court?

The Court: So understood.

Mr. Meserve: We will offer first a photograph and legend, that we have indicated as one, which is——

The Clerk: Plaintiff's Exhibit 1 in evidence.

The Court: Does the stipulation go to the extent that the process or method in use at the applicable time, under the complaint and answer, was the same as that depicted or picturized in the photographs?

Mr. Jewell: No, if the Court please, except insofar as the direct testimony of Mr. Morris appearing at the bottom of the picture will go to prove it. The Government can't stipulate that was the process that was used.

Mr. Meserve: We will connect that up, your Honor.

The Court: Is the Court to understand that the Government is stipulating that this verbiage that appears in typewriting under the picture in Plaintiff's Exhibit 1 may be considered as evidentiary, and has the same effect as evidence under oath?

Mr. Jewell: That is correct, your Honor, sub-

ject to [67] the same right of cross examination, if that appears necessary.

Mr. Meserve: Mr. Jewell and I dictated these legends together, and corrected them. There is one other statement I think appropriate to be in the record. It is to be understood between Plaintiff corporation and the Government that there will be no intention to take advantage of phrases in their perhaps technical application. In other words, a play of words is not intended by the legend; the legend is descriptive, and that the facts to be found by the Court are not to be applied from the legend except as it may be descriptive. That was the understanding, wasn't it?

Mr. Jewell: Yes.

Mr. Meserve: We got to the point where we were playing with words, as to whether they would have effect or not, and Mr. Jewell and I discussed it, and agreed that the legend was intended only to be descriptive.

Mr. Jewell: I think it can be stated that the legend is only descriptive, and any use of the words therein shall not call for a conclusion by the words themselves pointing toward either repair or manufacture.

The Court: The word "jobber" seems to be quoted in the legend attached to Exhibit 1.

Mr. Jewell: I believe that is done for the purpose of indicating that it is a sort of a slang name.

Mr. Meserve: In other words, it is a phrase that has [68] been developed in the trade or merchan-

dising that perhaps is not an accurate statement of his exact business—jobber.

The Court: There is no issue here of the correct interpretation of the phrases that appear to be quoted in the legend?

Mr. Jewell: That is correct.

Mr. Meserve: That is correct.

Mr. Jewell: We don't want the shadings of the words to have bearing upon the legal conclusion, but they are just used as best we could for descriptive purposes. For instance, if we use the word "make," and that connotes that rods are manufactured by plaintiff, rather than substitute some other word we ask that the Court ignore that connotation and follow the process described pictorially and verbally. For instance, if we stipulated, or Plaintiff, Mr. Morris, testified that the rods are returned, there immediately arises an implication that he sent them out, so we have tried to avoid the use of that particular word.

Mr. Meserve: The whole question, if your Honor pleases, is whether or not the J. Leslie Morris Company manufactured a connecting rod that is used in the automotive industry, or repairs on existing connecting rods.

The Court: Does the Government concede that to be the sole and exclusive issue in the case?

Mr. Jewell: Not the sole and exclusive issue, because [69] of this fact: That the tax is levied on sales by a manufacturer—I don't believe there will be any controversy, but that method of doing busi-

ness by the Plaintiff corporation amounted to sales of these rods which they re-babbitted. Whether or not those sales were sales by a manufacturer of automobile accessories will, I believe, under the cases, draw now only upon the actual process, although principally so, but also upon the manner in which Plaintiff conducts his business, and the general similarity to a manufacturer aside from that mere process.

The Court: That is what I was talking about; whether it was trade practice, or whether it is admitted to be in a certain category. Trade practices are very material. If it is trade practice that has been acquiesced in by the Governmental agency, that is one thing; if it is an open field of investigation, it is quite another.

Mr. Jewell: The Government contends that all evidence concerning the manner in which Plaintiff taxpayer, or the Plaintiff corporation, operates his business of merchandising the particular product, or, which construction is described in these pictures, and will be further elaborated on by testimony, that all of those facts, and the manner in which it conducts its business are relevant in determining whether or not sales by it were sales by a manufacturer.

The Court: The pleadings set up certain alleged conclusions by taxing agencies of the Government relating to re-tread- [70] ing tires, and other fabricated instrumentalities. I want to know whether those are going to be issues here, or whether you

are conceding facts of just what was done, regardless of the legal results from those facts.

Mr. Jewell: I don't believe I understand your Honor with respect to those matters appearing in the pleadings.

The Court: Maybe you have not read the pleadings.

Mr. Jewell: I believe I have.

The Court: They cite a number of instances here in which they claim there is an analogy between their cases and your cases.

Mr. Jewell: Whether that analogy exists will depend upon the proof Plaintiff puts on.

Mr. Meserve: Your Honor, I think we are still back to the fundamental statement I made. The issue, even though as amplified by Mr. Jewell for the Government is: Was the J. Leslie Morris Company, during the time involved in this period, a manufacturer of a device used in the automotive industry, or a repairer of a pre-existing device.

The Court: They won't concede that is the sole and exclusive issue, so we can't save time. I was going to save time by getting together on an agreement as to what the Court had to decide.

Mr. Meserve: I think your Honor perhaps understands, although we did not express it in as precise manner as it should be, that what we mean is that we are not bound by the language [71] using the word "make" as an admission of the manufacture, or the word "repair" as an admission by the

Government that that is the exclusive function of those two words, as an example.

Mr. Jewell: That's right. What I intend to mean is that there are certain other factors besides the particular process described in these photographs and the testimony appearing below. For instance, the manner of advertising, the manner of securing customers, and those sort of things, go to make the Plaintiff a manufacturer or not a manufacturer.

The Court: I think it is a concrete question applicable to each taxpayer whether he is a manufacturer or simply a repairman.

Mr. Jewell: That is correct. I believe the cases so hold.

The Court: Proceed.

Mr. Meserve: We next offer, your Honor, Plaintiff's Exhibit 2—is it, Mr. Clerk?

The Clerk: Yes.

Mr. Meserve: Picture 2, with the legend.

The Clerk: Plaintiff's Exhibit 2.

Mr. Meserve: Your Honor, we introduce the 32 separate exhibits that pictorially, with the legend, set forth the story of the business as nearly as we can abbreviate it. Wouldn't it be better if we waited a moment [72] and let the Court acquaint himself with the whole legend; then the rest of the testimony will be far more intelligible?

The Court: I think so. I have looked over these casually.

J. LESLIE MORRIS

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: You will state your name to the Court.

The Witness: J. Leslie Morris.

Direct Examination

By Mr. Meserve:

Q. Mr. Morris, you are an officer of the Plaintiff corporation? A. I am.

Q. In what capacity? A. President.

Q. You were the responsible person for its organization, of the J. Leslie Morris Company?

A. Yes, sir.

Q. When was it incorporated?

A. It was incorporated in 1925.

Q. Was that at the time that you commenced the business that you are now in?

A. No, we had been in the business two or three years prior to that time.

Q. Then you have been in the business of rebabbitting [73] connecting rods since '22 or '23?

A. About 1923.

Q. And you have been continuously engaged in that business since that date?

A. Continuously.

Q. Your principal place of business is in this city? A. Yes.

Q. You have how many other places that you perform this service?

(Testimony of J. Leslie Morris.)

A. At the present time we have one other, Chicago. We have branches, but where we perform the operation. I might say New York and Columbus also do some rebabbitting.

Q. Do you have other branches throughout around the United States?

A. Affiliated with our company, yes.

Q. Are you familiar, Mr. Morris, with the exhibits that have been introduced in this case, Plaintiff's Exhibits 1 to 32, inclusive, the pictures?

A. Yes.

Q. And are you familiar with the legend that is recited under each picture? A. Yes.

Q. And that fairly, in brief form, correctly recites the method by which connecting rods are treated through your plant from the time they arrive until the time they are ready to leave, is that correct? [74] A. Yes.

Q. The pictures were taken as of the present time? A. Yes.

Q. What difference, Mr. Morris, is there in the method of rebabbitting as indicated in the pictures, Plaintiff's Exhibits 1 to 32, than the method of rebabbitting used in 1932 to 1935, the period involved in this case? A. They are the same.

Q. The procedure?

A. The process was the same.

Q. Was substantially the same? A. Yes.

Q. Were the devices exhibited in the pictures, by which each operation was had, substantially the same? A. Yes.

(Testimony of J. Leslie Morris.)

Q. Briefly, Mr. Morris, will you tell us your method of doing business as distinguished from the mechanical method—do I make myself clear?

A. A large percentage of the connecting rods that are brought to us for rebabbitting come from automotive wholesale jobbers. These jobbers have in their establishments a stock or shelving of connecting rods that have been either rebabbitted by ourselves or by other companies performing the same service to what we term the industry. These connecting rods are exchanged in order to give immediate service. It is merely to facilitate service. Now, then, the whole- [75] saler, after making the exchange, sends the rods to us to be rebabbitted. That is one phase. Another is that on the later model rods, the rods that the jobber or ourselves probably do not have in stock,—those are sent to us by the wholesalers to be rebabbitted, and in this instance, we would send the same rods to them exactly that they send to us, because of the late model, or their inability to have a service or to exchange them, or because of the cost, or anything of that sort; we rebabbitt the same connecting rods, and send them back to the customer. Does that answer you?

Q. Mr. Morris, you also do business with such organizations as, for example, the Howard Motor Company, who are California distributors of the Buick automobile, do you not?

A. Yes, we have done that.

(Testimony of J. Leslie Morris.)

Q. And for J. V. Baldwin Company?

A. Yes.

Q. Who are the distributors for the Chevrolet?

A. Yes; and for Paul Hoffman.

Q. And the Paul Hoffman Company who are distributors for the Studebaker?

A. That's right.

Q. Just explain to us, Mr. Morris, what occurs when, we will say, you receive, as an example, 12 connecting rods from the Howard Automobile Company—Buick connecting rods.

The Court: May I interpose?

Mr. Meserve: Yes. [76]

The Court: Are those connecting rods new, or have they been used?

The Witness: The connecting rods that are sent to us, sir?

The Court: Yes.

The Witness: The connecting rods are sent to us; they are rods that have been removed from an automobile which is being repaired at that time.

The Court: And are they from automobiles that have been used for transportation?

The Witness: Yes, in every case; so far as we know, in every case. Of course, we can instantly determine a new connecting rod that had never been babbitted before.

The Court: Mr. Meserve's question may be propounded.

(Testimony of J. Leslie Morris.)

(The question referred to was read by the reporter, as follows)

"Q. Just explain to us, Mr. Morris, what occurs when, we will say, you receive, as an example, 12 connecting rods from the Howard Automobile Company — Buick connecting rods.")

The Witness: They go through the process that is shown in the pictures there, and are returned to the Howard Company. Now, in the event that the Howard Company was in a big hurry, and we had the particular rod already in stock, babbitted, which came from a similar automobile, similar Buick car, because they will not interchange—should we have that and Howard was in a hurry, he would probably say, "Give me an [77] exchange on that today. I need this one quickly." But very rarely that we exchange them.

By Mr. Meserve:

Q. Mr. Morris, start from the genesis of your business, the beginning of your business of rebabbitting used connecting rods—start from the first part of your business, if that can be done, before you build up the supply for exchange.

A. For at least two or three years after starting in our business of rebabbitting connecting rods, we did not own a single connecting rod. They were brought to us, we babbitted them and returned them to the customer that brought them to us.

(Testimony of J. Leslie Morris.)

Q. The identical rod?

A. The identical rod. We would get them in groups. We had no exchange service at all at the beginning of our business. Later that came in as a part of the business, just to expedite the repair operation on automobiles.

Q. In other words, Mr. Morris, do I understand it to be a fact that as your business grew, from its beginning, where you rebabbitted connecting rods and returned them to the customer and delivered the identical rod received, rebabbitted,—as your business grew you acquired certain definite brands of connecting rods, such, as for example, the Chevrolet, Ford, Studebaker, or the well known makes of automobile or automobile motors? [78]

A. We found that was necessary to give the service that the trade demanded.

Q. By that you mean this, if I can state it correctly: An employee of J. V. Baldwin comes to you with two connecting rods for rebabbitting, of a given size. If he does not want to wait, and you have them in stock, you hand him two connecting rods that have been rebabbitted, is that correct, and take his two which he brought in in exchange, and charge him for the rebabbitting?

A. That is right, if you will eliminate the phrase "of a given size," because if it is of a special size we have to give the same connecting rods back; they have to be rebabbitted.

Q. I merely intended to use "size" as standard in size.

(Testimony of J. Leslie Morris.)

A. The standard size, yes.

Q. When you say "standard size," you mean the size of the connecting rods used in motors strictly used in the industry?

A. Yes, the size that originally came in the car.

The Court: I want to develop that.

The Witness: I am sorry.

The Court: I don't think it's your fault. Let us take the type of automobile—any type; say the type in 1937, for illustration. Have the types of the construction upon which you work been changed annually, or at intervals? [79]

A. At intervals.

Q. Let us take any of those cars, so as not to advertise any of them particularly, any of those standard makes of automobiles, of 1937 type. Supposing one of those cars was in the repair shop and it was necessary to secure one of your appliances. Just how will that be brought about? Suppose the automobile needs repair of the part as to which you fabricate an instrumentality; just explain the process.

A. The garagemen, or wherever the automobile is being repaired—the repairer, let us say, of the automobile, would bring in a connecting rod. It is a common practice; that happens dozens of times a day. The connecting rod that he has received from the automobile he brings in to our establishment, and we babbitt it, if we have none we can exchange for it, or, in many instances, they demand we bab-

(Testimony of J. Leslie Morris.)

bitt the same one and return it or, if they are in a hurry, and would like for us to exchange it, and we have one in our stock that was removed from a car identical with the one he has brought us, then we make the exchange.

The Court: So there are some instances where you supplant the connecting rod that is to be repaired with a connecting rod that has been theretofore repaired from another vehicle?

The Witness: From another vehicle of exactly the same make, the same year, that used the same connecting rod.

The Court: But an instrumentality that was in a [80] separate vehicle entirely from the one from which the connecting rod that was brought in by the repairman was taken?

The Witness: Yes. We look at it on an exchange basis.

By Mr. Meserve:

Q. Mr. Morris, rebabbitting, or the babbitt is the wearing surface of the bearing, isn't it, on a connecting rod? A. Yes.

Q. It is the wearing surface? A. Yes.

Q. The same as the sole of your shoe is the wearing surface of your shoe; that is the bearing of your foot, is that correct? A. Yes.

Q. And babbitting is replacing the wearing surface of a soft metal back in the bearing of a connecting rod, isn't that correct?

(Testimony of J. Leslie Morris.)

A. That is correct.

Q. And in the early days of the automotive industry, when automobiles were rare, and were luxuries instead of necessities, that function was performed in a great many instances, and in nearly all instances, in the garage itself, or in the establishment of the car manufacturer, when they had a burned out bearing? A. Yes.

Q. They rebabbitted it by hand in their own shop? [81] A. Yes.

Q. When they were repairing the automobile?

A. Yes.

Q. And as the industry grew, it has become a specialty; rebabbitting has taken that function away as a part of the garageman's duty? A. Yes.

Q. For the sake of speed, and a better finished wearing surface; isn't that correct?

A. That is correct.

Mr. Jewell: If the Court please, I request that counsel for the Plaintiff not make his questions quite so leading.

Mr. Meserve: I don't intend to lead the witness, your Honor, in anything that I cannot establish by an indirect question, except and only for the purpose of brevity and clearness.

Q. Mr. Morris, so that we may have before us a physical look at a connecting rod, do you have one in the courtroom here? A. Yes.

Q. Can you produce it for us?

A. Yes, sir.

(Testimony of J. Leslie Morris.)

Q. You have here a box, Mr. Morris, of an assembly of several connecting rods. Will you assist us by selecting from them any one connecting rod, and describe it for us?

A. The connecting rod I have in my hand is a rebabbitted [82] rod for a Packard automobile. This is the identical rod as removed from the Packard, that probably the exchange would be for. This was removed because the babbitt was worn. When this car is repaired, they bring it over to us, and we either rebabbitt the same one or make an exchange.

Q. That is, if you have a particular rod of the same size in your establishment?

A. Yes, the same diameter, width, and all; if it happened to be the same connecting rod, and also a definite distance from the crank shaft up to the wrist pin. In other words, we can only use a connecting rod made by the car manufacturer. These are both connecting rods made by Packard. It is just a case of which one was presented to us, whether we exchanged it or whether we put it through the shop and babbitted it. The result is the same.

The Court: This internal annular member, that is not cast with the shaft itself; it is separate?

The Witness: It is a separate operation, sir, even at the factory.

The Court: Supposing the ring,—I will call it the ring,—the annular metallic member itself——

(Testimony of J. Leslie Morris.)

The Witness: The shaft?

The Court: I am speaking of this member as distinguished from the outer frame, the inside ring, the metallic-like annular member, do you understand?

The Witness: Yes. [83]

The Court: I don't know whether I explained it in trade parlance.

The Witness: You do. Might I say that this is not separate. This is all machined; all a part of the same forging. That is just the action of the cutting edge around there. This is not a bearing. That is inserted.

The Court: That answers the question.

The Witness: Another rod would not show it that way.

Mr. Meserve: Your Honor, may I be so rude as to interrupt, and have these two identified before we go to two more, so that we may know what we are talking about?

The Court: Yes, these may be identified.

Mr. Meserve: We will identify the rod without the babbitt as Plaintiff's Exhibit next in order.

The Court: Of the Packard.

The Clerk: Plaintiff's Exhibit 33.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 33.")

The Witness: They are both Packard connecting rods.

(Testimony of J. Leslie Morris.)

Mr. Meserve: And the rod that has been babbitted?

The Witness: That was a babbitted flange——

The Court: Just wait a minute until we get it identified.

The Clerk: Plaintiff's Exhibit 34.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 34.") [84]

The Court: Now, Mr. Meserve, you have these two rods here, and we will mark these now, Mr. Hansen.

Mr. Meserve: Mark the one that is not babbitted as the next exhibit in order.

The Court: These are the Buick construction?

The Witness: Exactly.

The Clerk: Plaintiff's Exhibits 35 and 36.

(The rods referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 35 and 36," respectively.)

The Court: Do you desire to explain something about the construction of this that will clarify what is in the Court's mind?

The Witness: Yes.

The Court: Will you do so?

The Witness: The Buick, this——

The Court: Let us avoid the use of the word "this," and "those," and refer to them here by the exhibit number, if we can. Each one of these instruments will now be marked. You will find it on

(Testimony of J. Leslie Morris.)

the tag, Mr. Morris, if you will refer to those respectively.

The Witness: Exhibit 35 represents a connecting rod, and it is probably removed from the vehicle. The babbitt, you will observe, is damaged. That connecting rod would have given further service, and probably was removed because of piston ring trouble. It was probably pumping oil, and the [85] mechanic gets into the automobile to correct the oil pumping, which is a very common act of the garage service, and in opening up this, he finds it is cracked. Exhibit 35 represents a connecting rod which would probably be an exchange. As a matter of fact, this one was offered to us in exchange for Exhibit 36, which is the identical connecting rod, both carrying the name of the manufacturer.

By Mr. Meserve:

Q. Mr. Morris, may I interrupt just a minute so that we can get the story seriatim in our minds?

A. Yes; probably I am not making it clear.

Q. That is all right. Will you just explain, so we will all have it clear, the function of the connecting rod, first.

A. The connecting rod connects the piston which carries the energy from the cylinder when the charge of gas and air are exploded in the cylinder. The connecting rod delivers the energy to the crank shaft.

Q. The lower end of the shaft, that is babbitted, is the circular part that is attached to the crank shaft of the motor? A. Yes.

(Testimony of J. Leslie Morris.)

Q. And the upper end, which you are holding in your hand, Plaintiff's Exhibit 36, is the part that attaches onto the piston? A. Yes. [86]

Q. And is known as the wrist pin?

A. No, it is by means of the wrist pin that the piston is attached to the connecting rod.

The Court: I believe you stated that 35 would probably be exchanged?

The Witness: Yes.

The Court: Why would that be true?

The Witness: Because of the break in the babbitt at the point near the edge.

The Court: Why would it not be repaired and the identical instrument sent back to the customer?

The Witness: Purely from a matter of service and speed. It would take probably three-quarters of an hour to babbitt the same connecting rod.

The Court: But it could be rebabbitted and work efficiently in the motor vehicle from which it was originally taken?

The Witness: Yes, because in many instances we do rebabbitt the same rod and it goes back and functions efficiently in the vehicle from which it was removed.

Mr. Meserve: I perhaps think, your Honor, that we haven't got the matter entirely clear, either for the record or for the Court.

Q. The connecting rods that are brought in to you for babbitting, Mr. Morris, are not in any way unusable for the same motor from which they have

(Testimony of J. Leslie Morris.)

been removed, or an identical [87] motor of the same type, are they? A. No.

Q. Except and only for reservicing the wearing portion of the bearing, which is babbitted?

A. Yes.

Q. And that is one of the common failures in automotive operation? A. Yes.

Mr. Jewell: If the Court please, just for the purpose of keeping the record, because the Government is interested in these types of cases, not so much in this particular case, except as it represents a type of case all over the country, and with the type of examination which is leading, Mr. Meserve has induced the witness to state two things which are exactly contrary to each other.

Mr. Meserve: I have no intention of making contrary statements.

Mr. Jewell: I know you haven't, but for the purpose of clearing up the record, I think he should confine his examination to a little bit more direct questioning, because the witness answered yes to a question that the rods were in no way unusable, and then he added the qualifying phrase, except insofar as the babbitt had been melted, or was non-usable. I think it will clutter up the record, unless the examination is kept in more direct questions.

The Court: I think leading questions should be avoided, [88] especially with an informed witness. I take it the witness understands the process thoroughly.

(Testimony of J. Leslie Morris.)

Mr. Meserve: There is no doubt about that, your Honor.

The Court: He probably understands it better than counsel or the Court; and if the questions are direct, he will impart to the Court his knowledge, without any leading questions.

Mr. Meserve: The point I had in mind, I thought it was indicated just at the close of your Honor's last remarks—the impression was left with me that the Court thought these connecting rods that were brought in were in some way damaged, and that only occasionally one could be repaired and sent back.

The Court: It is rather an unsafe thing for counsel to exercise the powers of divination as to what the Court thinks.

By Mr. Meserve:

Q. Mr. Morris, you have here, as I understand it, a series of connecting rods exemplifying the process of rebabbitting the same type of rod?

A. Yes.

Q. Will you select those, please?

A. I will be glad to.

Q. You just put them upon the stand, Mr. Morris, and hand me the first rod of your selection.

A. This is a Chevrolet connecting rod. I had the boys take two or three of them together, just as they came to us [89] for rebabbitting. The connecting rod, as it comes to us to be rebabbitted—this is a Chevrolet of 1937 type; Chevrolet-6.

(Testimony of J. Leslie Morris.)

Q. Are the three that you are discussing the same?

A. All the same; just removed from a Chevrolet 1937 automobile.

Q. Just select one of those so that we can have it identified.

The Clerk: Plaintiff's Exhibit No. 37.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 37.")

By Mr. Meserve:

Q. Plaintiff's Exhibit No. 37, Mr. Morris, which you have identified is what, again, for the record?

A. It represents the connecting rod as it is received from a 1937 automobile, Chevrolet.

Q. Do you have a way, Mr. Morris, of identifying that type or make of automobile from an examination of the rod itself?

A. Yes, they all carry a numbering on the shank of the rod.

Q. Do they carry the manufacturer's name as an identification mark?

A. In many instances they do. In some instances they do not.

Q. Do they, on a Chevrolet? [90]

A. Yes, they do.

Q. Is it on the rod in question, the one which you just introduced?

A. Frequently, in Chevrolet parts, as well as others of that group, you find generally G. M., mean-

(Testimony of J. Leslie Morris.)

ing General Motors. This one here—that one seems to have only the number on it.

Q. What is the next rod in the series that you have before you, and the next process?

A. I brought this in so that we could follow the legend that is on the pictures, and show each operation as it took place.

Q. That is correct.

A. The next operation, after melting the babbitt out of the connecting rod, the old babbitt that is left in there, is to tin the connecting rod. That has been tinned, and is ready to receive the charge of babbitt we are going to pour in there, as described by our pictures. There are different stages.

Q. Is this connecting rod you have handed me still a Chevrolet?

A. A Chevrolet, 1937 car.

The Clerk: Plaintiff's Exhibit 38.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 38.")

The Witness: As described in the legend, the next [91] operation is to insert the steel separator shims, and then cast the babbitt into the connecting rod. The separator shims are placed in there so that the connecting rod and the cap will be equally separated in two pieces—will be equally open as these two separator shims are removed.

Q. The rod which you have just described is a rod for use in a Chevrolet? A. Yes, 1937.

Q. The next step in the process——

(Testimony of J. Leslie Morris.)

The Clerk: Plaintiff's Exhibit No. 39.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 39.")

The Court: Let me interrupt just a moment. I observe on these tags, as you refer to them, certain legends and figure at the head of them. Does that correspond to the photographs that have been introduced in evidence?

The Witness: No, sir, I am afraid it does not. I can readily put numbers on them though.

The Court: If you did it would facilitate the examination, and save our time. If that hasn't been done, you may go through it.

The Witness: The separator shim is now removed; the connecting rod has carefully been bolted together, and it is now ready to be machined. We are now ready to pour the babbitt in the connecting rod.

Q. And your last statement refers to the connecting [92] rod you have handed me?

A. Chevrolet 1937, yes.

Mr. Meserve: I offer that as Plaintiff's Exhibit.

The Clerk: 40.

(The rod referred to was received in evidence and marked "Plaintiff's Exhibit No. 40.")

Mr. Meserve: May I interrupt you, Mr. Morris? And I think, with the Court's permission, it would be better to put the rod in first, and then describe it by Exhibit number, if I may do that.

(Testimony of J. Leslie Morris.)

Q. Now, Mr. Morris, Plaintiff's Exhibit 41, if you will describe it.

A. Represents the next step in the process of rebabbitting. We have bored out the babbitt and faced the edges of the babbitt so that the rod is the proper width. It is a steel flange. We do no facing with the rod at all, but we do face the babbitt; chamfer the inside. Plaintiff's Exhibit 42 is the final step in babbitting the Chevrolet 1937 connecting rod. Oil grooves have been cut, and the connecting rod is ready to be installed in the automobile from which it was removed, or any other Chevrolet of the same year and make.

(The rods referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 41 and 42," respectively.)

Q. From the last exhibits that have been introduced, and that you have testified concerning, Mr. Morris, can you [93] select one as an example upon which you can show us the identification of the original producer of the rod, or source of its manufacture?

A. Practically every one of these——

Q. From one exhibit that is in evidence.

A. Yes, this is an exhibit. This is a Packard number. That is generally accepted in all books, and that is a product of the Packard Motor Company. It was either made by or for them, because they all carry that same number on the shank of the rod. This rod is a Buick and "Buick" is very definitely

(Testimony of J. Leslie Morris.)

marked on there, on both of the rods; that is, Plaintiff's Exhibits 36 and 35.

Q. And next to the Buick name?

A. The Buick trademark.

Q. Is there anything on the Chevrolet rods that is similar?

A. The Chevrolet rod has the characteristic number that is always there, and it always has "G. M.," indicating General Motors. I have one Chevrolet here that carries another number: C. B. 463.

Q. Does that indicate anything to you?

A. Yes, it does. That is the manufacturer of the connecting rod.

Q. What manufacturer, or do you know?

A. I do know. Clawson and Bals, of Chicago.

Q. Who manufacture connecting rods for automobiles? [94]

A. Steel forging; yes; the steel connecting rod is forged.

Q. Mr. Morris, in referring to the identification marks that you have just testified to, on the exhibit before you, as to the Packard and others, how are they placed on the shank of that connecting rod?

A. That represents an operation in a drop forging plant. The connecting rods are forged from a billet of steel. Two dies—and by die, I mean a piece of hard steel that is recessed to form half of this we see here as the connecting rod, and the other

(Testimony of J. Leslie Morris.)

side is recessed to form the other half—those two are actuated by a press and hammer. We speak of that as a drop hammer, because it drops; the same operation exactly as a blacksmith does, except they do it with dies in the industry; and that forms the billet into the connecting rod. It is very heavy equipment, and I don't know but one in Los Angeles that is capable of doing it. It is just scattered over the country—the few people that can drop forge in dies the connecting rods used in automobiles.

Q. The drop forging does not in itself make the connecting rod?

A. No, that makes what we call the blank, and from that it is machined. It is placed in heavy machinery that is necessary to cut this type of steel, because it is very tough steel, and ordinary equipment will not handle it. [95]

Q. Then do I understand it to be correct, Mr. Morris, that the numbering and the identification mark of the car manufacturer is in the die in the drop forged piece?

A. Yes, and you then get, as a result, the raised figure on the shank of the connecting rod, because it is a recessed figure on the die that forms it. That gives the result in a raised figure on the shank of the rod. I might add that this knowledge of mine is simply in observing operations. I have never in my life been identified with any drop forge company.

Q. Now, at any time during the operation of your business, Mr. Morris, from the beginning to

(Testimony of J. Leslie Morris.)

date, have you ever removed from any connecting rod its manufacturer's identification mark?

A. Never.

Q. Would there be any way to remove, we will say, for example, the Packard identification marks on Exhibit 33, and replace them with any similar type of identification marks, raised?

A. No, that would be impossible.

Q. Of your own, or any other person's selection?

A. So far as I know, that would be impossible.

Q. That must be done by drop forging with the die in which the billet is cut, from which the rod is ultimately [96] machined?

A. That is correct.

Q. Now at any time, Mr. Morris, in the operation of your business, from its beginning to date, have you ever put any identification mark on a rod of your own? By that I mean of your own company? A. A steel identification?

Q. An identification mark on a connecting rod of your own?

A. No. I might say we put occasionally, in the days gone by—I remember a few years ago, probably the late '20's, we had a rubber stamp stamped "Moroloy"; it was nothing permanent. The very moment it was installed the oil would erase it.

Q. "Moroloy" is a trade name you have for your babbitting process? A. That's right.

Q. I am asking you if you have ever removed from any connecting rod that was in your plant its

(Testimony of J. Leslie Morris.)

identification marks or numbers, and replaced thereon an identification mark of your own, as being a connecting rod of your own manufacture.

A. Never.

Q. If a person desired to remove the numbers or the name, we will say, "Buick" from the ones you have in the exhibit, or "G. M.," and certain numerals, they could be [97] machined off there?

A. If they wanted to do it, the simplest way would be to grind them off with a circular wheel.

Q. And it could not be replaced in raised numerals or letters.

A. Not to any knowledge of mine could it be done.

Q. What would be the only way a person could put back on a plain rod any identification mark?

A. With steel stencils.

Q. It would cut into the rod instead?

A. It would cut into the rod instead.

Q. State, Mr. Morris, whether or not each connecting rod that comes into your plant, retains the original identification marks that were on it.

A. All connecting rods that come into our plant retain the original identification mark that was on it. The caps and the shank portion of the connecting rod are kept together. One cap is never placed on another connecting rod.

Q. Just explain to us what you mean by "cap" and "shank,"—those portions of the connecting rod.

A. That is detached to allow it to be placed

(Testimony of J. Leslie Morris.)

around the crank shaft. What we speak of as the cap—I am describing Plaintiff's Exhibit 33—this cap is machined by the Packard Automobile Company, or somebody whom they employ to do it, and we must keep the cap and rod at all [98] times together. This cap must be put back on the same connecting rod, and we rebabbitt it; if I make myself clear.

Q. Referring to the last statement, Mr. Morris, as it relates to the exhibit of the Chevrolet rods, you use the same cap on the identical rod that it came on? A. We do.

The Court: Aren't these shanks and caps interchangeable?

The Witness: No, sir, they are not machined that well.

The Court: There is a variance between all of the different manufacturers?

The Witness: Yes.

By Mr. Meserve:

Q. And there would be a variance between all of the connecting rods of the same class of the same manufacturer?

A. There would be a variance in the same connecting rods in the same automobiles, if I make myself clear; that is, as to width, and all, because they have been machined together when they were made, and the bolt holes are not always directly in the center of these two widths, so if I take a cap from this connecting rod and put it on this, you will very

(Testimony of J. Leslie Morris.)

frequently find an uneven edge, which interferes with your rebabbitting. That is the purpose of keeping the cap portion and the shank portion of the connecting rod [99] together.

Q. That would be true of the six cranks taken out of the same cylinder motor?

A. Six connecting rods you mean to say?

Q. That is what I mean.

A. Taken out of the same motor, yes.

Q. Mr. Morris, I would like to have you explain to us the method by which you do business with your customers. I tried to make that clear at the beginning, and we were led off into this mechanical operation.

A. The customer consists, as I said in the legend, of three types: The car manufacturer—the car agency, I should say; the car agency, the industrial account, and the automotive wholesale merchant. The automotive wholesale merchants probably give us 85 per cent of the rebabbitting business that we enjoy.

Q. Can you give us an example of an automotive wholesale merchant by name?

A. Yes, Chanslor & Lyon Company—Chanslor & Lyon Stores, Inc., I believe is the exact title. Colyear Motor Sales Co.; and one that is known by all of us, the Western Auto Supply Company.

Q. Give us the process of your business relation with any one of those customers.

A. Their truck will come up to our door and lay

(Testimony of J. Leslie Morris.)

off a package of connecting rods for rebabbitting. Those rods [100] are checked in.

Q. You don't need to describe that.

A. That is shown in the legend. I was going to say the connecting rods are rebabbitted and returned to the customer.

Q. And what charge is made?

A. For the rebabbitting charge only.

Q. You referred in the early part of your testimony, Mr. Morris, to an exchange. I want you to clarify that. Explain what you mean when you make an exchange with your customer.

A. The connecting rod is brought to us for rebabbitting. If the customer is in a hurry and wants it quickly, and we happen to have a connecting rod from identically the same type of automobile—by type, I mean make and model and year—then, instead of delaying him for the time necessary to babbitt his own connecting rod, that he brought to us, we hand him an exchange connecting rod, which is exactly the same thing except that we have babbitted it previously, and already have it on hand. The charge is exactly the same for rebabbitting it or exchanging it. We make no additional charge for the service of exchanging the rod. If he wants his own connecting rod babbitted and given back to him, or if he wants to accept the exchange which we have to offer, the charge is exactly the same.

Q. How do you acquire, Mr. Morris, the connect-

(Testimony of J. Leslie Morris.)

ing [101] rods that you have rebabbitted, that you have waiting to exchange?

A. We bought the earlier ones. Of course, we have bought no earlier ones now for many years; we bought them from established agencies. They secured the earlier type of rods from car wrecking establishments, when they had been removed from the automobile. They get them together and select them, and we buy them at so much apiece. The connecting rod that we are always more in need of than those obtainable is the late type of connecting rod, as for instance, as we sit here, the 1939 or the 1940 Chevrolet connecting rods are very much in demand. We find it necessary to go to the J. V. Baldwin Company and buy 100 or 200 connecting rods for our stock. We not only have to stock ourselves, but we have to stock the jobber who is depending upon us, or the automotive merchant who is depending upon us to service him in the connecting rod rebabbitting exchange business.

Q. Then you buy these new from J. V. Baldwin, as a dealer?

A. It comes to us in the original package, in the case of General Motors, from J. V. Baldwin. Occasionally we buy from Felix, another Chevrolet dealer, and they come in original boxes.

Q. You stock them on your shelves?

A. Yes. [102]

Q. That is a babbitted connecting rod?

A. We get it babbitted by the factory; it is a complete connecting rod.

(Testimony of J. Leslie Morris.)

Q. You take that new Chevrolet connecting rod, and do what with it, when one of your customers comes in with a used one?

A. We exchange it, sir, with our regular charge for rebabbitting that connecting rod, just the same as if we rebabbitted it ourselves.

Q. And the one that is exchanged, the one that is brought in, you rebabbitt it and put that in stock?

A. Yes, we put that in stock.

Q. And repeat the same operation on the next rod that comes in of the same type?

A. Yes. May I interject a thought? We repeat it over and over to the extent that we have never purchased connecting rods to be rebabbitted in volume. They won't even represent five per cent of our monthly sales of rebabbitting.

The Court: Read that.

(The record referred to was read by the reporter, as follows:)

"Q. And repeat the same operation on the next rod that comes in of the same type?

"A. Yes. May I interject a thought? We repeat it over and over to the extent that we have never purchased connect- [103] ing rods to be rebabbitted in volume. They won't even represent five per cent of our monthly sales of rebabbitting.")

The Witness: I think I had better clarify that. The purchase of connecting rods for rebabbitting represents less than five per cent of our rebabbitt service to wholesalers.

(Testimony of J. Leslie Morris.)

The Court: And the other ninety-five per cent is largely exchange?

The Witness: That is it. They ship rods to us, and we ship them back.

The Court: That is a little beyond what I had in mind. How much of that ninety-five per cent is included in the delivery to your customers of a new rod that you have obtained from someone who deals in new rods?

The Witness: Five per cent; just about five per cent of our monthly sales.

The Court: The other ninety-five per cent would consist of taking the used and damaged rod and processing it, as you have described, and delivering that identical rod so processed back to your customer?

The Witness: No, sir; not the identical rod; a rod exactly like it.

The Court: That is what I am talking about.

The Witness: Yes. Not the identical rod, but a rod exactly like it. [104]

The Court: How much of the approximately ninety-five per cent of your volume is brought about by delivering to the customer the identical rod which you got from him, after having processed it in your establishment?

The Witness: I would say—of course, it will vary from time to time, but year in and year out I would say it would average possibly 15 or 20 per cent.

The Court: Then at 60 or 65 per cent—let us

(Testimony of J. Leslie Morris.)

put it in the larger figures—would consist of the delivery to your customer of a rod that had either been processed in your establishment, or a new rod that had been obtained by you from one of these dealers?

The Witness: That is exactly correct, yes, sir.

By Mr. Meserve:

Q. Mr. Morris, when a rod is brought in to your establishment from one of your customers that is bent or broken, in any part of it, do you use it?

A. We cannot accept it for rebabbitting. Our catalog and our price sheet both stipulate that cracked, bent, or broken connecting rods cannot be accepted for exchange, and we return them to the sender.

Q. Then to that extent you do not in your business use damaged connecting rods?

A. We cannot.

Q. The connecting rod, as a connecting rod, must be in perfect condition, except and only as to the wearing, bearing [105] surface which you babbitt?

A. The babbitt liner which goes in between the crankshaft and the connecting rod, yes.

Q. Any other deviation than that is rejected?

A. It makes it unfit for further service, yes.

Q. Either for rebabbitting that rod or for the replacement of one of like kind?

A. We send it back to the customer that sent it to us, because it is unfit for further service.

Q. Then in your place of business, Mr. Morris, you do nothing in any way to repair a connect-

(Testimony of J. Leslie Morris.)

ing rod other than the babbitt in the lower end of the shank? A. That is correct.

Q. You don't attempt to align them or straighten them?

A. The rod is straightened in the process of boring it. We bore it in parallel with the pin. The rod is held on the wrist pin. That simulates the wrist pin, when it is in service, and the tool that bores through this, as shown in the legend, is bored parallel to this hole. If there was a slight bend in the connecting rod, it would still be parallel.

Q. I don't think you followed my question. Look at Plaintiff's Exhibit 36. Had that rod come into your plant with a bend in the shank——

A. We couldn't use it. [106]

Q. Let me finish,—would you straighten it in your plant,—the bend in the shank? A. No.

Q. Or repair any other similar type of damage?

A. No.

The Court: The connecting rod—to simplify it —is made up of two units; the shank, and what do you call the other?

The Witness: The cap.

The Court: Your work is exclusively on the cap part of that device?

The Witness: No sir, we babbitt this part, between the shank and the cap.

The Court: You include that shank, do you?

The Witness: This is separate at this point, and these two bolts hold them together. This cap would

(Testimony of J. Leslie Morris.)

be detached. I have one here. You see the break line?

The Court: Yes.

The Witness: We babbitt both sides, of course.

By Mr. Meserve:

Q. Mr. Morris, it is required to babbitt the entire circular inside portion of the crankshaft, the upper part of the shank and cap, in order to make a complete bearing surface?

A. The connecting rod?

Q. The connecting rod, I mean. [107]

A. Yes, it is necessary to babbitt the entire circumference of the bearing.

The Court: If the shaft were bent, why wouldn't you straighten it, true up the device?

The Witness: Because a connecting rod is a very important part of the engine, and failure of the connecting rod means not just the replacement of that connecting rod, but invariably it means that the entire engine has to be replaced, because in breaking, they almost always are thrown to the side of the engine. We have instances of that at all times. So we never attempt to correct an imperfection in the connecting rod itself for fear of the responsibilities that it entails with the customer.

The Court: Supposing there was a torque, or strain, or a stress on the shank of the rod, and the result was that the rod was bent, not broken; there was no fracture in the metal, but there was a bending of the metal, and only in a small degree, but in

(Testimony of J. Leslie Morris.)

a large degree mechanically and from an engineering standpoint, would you service that part of the rod?

The Witness: I might say, sir, that that would be corrected when the piston was attached to the rod. There is a practice of aligning the connecting rod and piston just before they are installed into the cylinder. We don't have this device; that is in the garage. In other words, the service that you mention is a part of the garageman's [108] service in installing the connecting rod in the engine, rather than in our place, where we are babbitting it. To correct that slight bend that you speak of, that is a service of the garageman.

We have in each garage a fixture known as an aligning jig, and that aligning jig is employed after the piston has been attached to this end of the connecting rod, and I think the slight irregularity that you refer to would be corrected at that time with just an ordinary lever bending it, that goes with the aligning jig; but we are not called upon to do it ourselves at all.

By Mr. Meserve:

Q. Mr. Morris, if in going through the operation of rebabbitting, in your plant, a connecting rod was discovered to be out of alignment, as indicated by the Court in a previous question, would you proceed to then rebabbitt it, if it was bent?

A. No, our catalog states definitely that we do not, and will not.

Q. You do not——

(Testimony of J. Leslie Morris.)

A. We do not rebabbitt a bent rod, no, sir.

Q. Or one that is out of alignment, as you see it?

A. Yes, as we observe it from the eye, because we do not check for alignment.

Q. What, Mr. Morris, is your method with the customer, take, for example, who is outside of the city of [109] Los Angeles, at Fresno, who writes and asks you to ship him so many of a specific type of connecting rod that you have rebabbitted and have on your shelf? What is your method?

A. The method of shipping those—we ship the connecting rod, and make a charge for rebabbitting.

Q. What other charge, if any, do you make?

A. We require a deposit, which is carried as a deposit charge, which will be refunded when the forging, which we haven't charged him for, is returned to us in exchange.

Q. You require a deposit on what?

A. On the connecting rod. We charge merely for the bearing when we ship it to him, and we send him the connecting rod itself; therefore he makes a deposit, which stands on our books until he has returned the connecting rod that he has received from the automobile, to us. In other words, if he comes to our counter and says, "Let me have a 493 connecting rod," which is our Exhibit 36, in the parlance of our stockbook and our handling of the connecting rod, and he brings none with him at all, we charge him a deposit until the exchange connecting rod which is acceptable to us for rebabbitting is

(Testimony of J. Leslie Morris.)

brought to us. Now, on our Fresno question——

Q. Let me stop you a minute. When you say you charge him a deposit, you charge him a deposit for the price of the rod, and make him a separate charge for the rebabbitting? [110]

A. That's right; for the sake of speeding up, we frequently combine the two, but in that instance we use the word "complete," which indicates he has a deposit on the connecting rod itself.

Q. Then what occurs if you later receive from this customer a rod of a similar type?

A. We immediately issue him a credit for the full amount of the deposit.

Q. The full amount of the deposit or the cost of the rod, is that it?

A. Yes. We show a deposit charge opposite each rebabbitting quotation.

Q. What does that deposit charge represent?

A. It represents the value of the connecting rod itself, as we determine it on the basis of supply and demand at the time. In going through our book you will find a great many of them with the valuation of 10 cents for the reason that they are no longer desirable; they are obsolete. They were used in cars that have long since passed from the highway, and in many instances we suggest to them that we would just as soon sell them the rebabbitting, connecting rod and all, instead of bothering to send the old connecting rod back, because it is for an obsolete car which is no longer used on the highway.

(Testimony of J. Leslie Morris.)

Q. Then the amount of deposit is dependent upon the current demand for that type of connecting rod? [111]

A. Yes. On the other hand, if it was a very late connecting rod, we would probably charge as much as $12.00. In the late Packard, like I have in my hand, it is unobtainable except from the Packard place, and you pay $12.00 when you go to buy it. So they range from ten cents to that.

Q. That is the current unit charge for the connecting rod?

A. Yes, what we can get the agent to duplicate the rod for in the event the customer did not send it back.

The Court: You referred to obsolete rods that come to the establishment. What do you mean by an "obsolete rod"?

The Witness: I mean a rod that was built by the manufacturer, as an instance, in an automobile that has now long since been consigned to the scrap heap. For instance, let me cite for example possibly a 1913 Jewett, or possibly, if your memory goes back so far, to a Crit, or Corbin, and some of the cars that we knew at the beginning of the automobile industry, that have no value now because they will fit no other automobile except the one it was intended for. That is why we speak of it as obsolete.

The Court: What do you do with that obsolete rod that you took in the course of trade?

(Testimony of J. Leslie Morris.)

The Witness: Unless we had one, and we don't usually have these obsolete ones; we have long since sold them to the junkman, and he has hauled them away; there is no purpose of babbitting them any more; the opportunity of selling them [112] is too remote.

Q. Then you do not sell any of those rods that you have characterized as obsolete?

A. No, sir, we have no market for them.

Q. I can't understand why a charge is made, then, on account of an obsolete rod.

A. I will explain that. The wholesaler we send rods to sometimes carries a rod of that type in stock. You understand that 10 cents was not arrived at automatically—just instantaneously; the 10 cents, through the years, has probably decreased in value from $1.50, maybe two or three dollars; maybe five dollars. Fifteen years ago say a rod that is now carried for ten cents was probably worth five or six dollars. The wholesaler, when he has these in stock, we, of course, ask him to send them in before they have lost their value, because in the business we are in, we have to protect the wholesale merchant a great deal, and that is why we carry the valuation down rather than write it off entirely. We feel it is his obligation if he fails to send it in at any time during its downward course, and he retains it in his stock. Do I make myself clear?

Q. You make yourself clear, but I don't understand just why you take a device that is obsolete

(Testimony of J. Leslie Morris.)

in the conduct of your reconditioning business. It depends upon what you mean by obsolete.

A. I mean by that we don't babbitt it and put it back [113] in stock.

Q. Would you junk it?

A. Yes, we would probably throw it out the window, so generally it will ultimately be sold as junk. It is not worth rebabbitting again. We have probably two or three we have been caught with, and would be glad to get rid of it because we are unable to sell the babbitting surface on it any longer.

Q. These devices would be infinitesimal, the obsolete devices that you take in in your business?

A. I don't exactly like the phrase that we have taken them in. We take them in only when we get an opportunity to sell one which we had in stock.

Q. By "taken in," I just meant to emphasize what you have stated in several other words.

A. Yes.

Q. Did I do it correctly?

A. You did it correctly, yes. I understand.

Q. You spoke earlier in your testimony about putting a rubber stamp on the inside of this babbitt that would come off when the lubrication occurred. What was that; a patented process you have?

A. No, just a trade name. We did not put it on the babbitt, but stamped it on the shank, and we only did it for, I imagine, 60 days. We found it did no good; it did not stay on the rod at all. It was a pure experiment. I understood [114] Mr. Meserve's question to refer to the practice way back in the

(Testimony of J. Leslie Morris.)

'20's which really indicated it was babbitted by us. It was a rubber stamp, with red ink on it, that instantly came off, washed off, and there was no purpose of using it further.

Q. During the applicable period in this case—you know what I mean? A. Yes.

Q. —did you put a mark of any kind upon the instrument that you processed?

A. We never put on any kind.

Q. You spoke about some catalog. You had some prospectus of your activity? A. Yes.

Q. You have that here in court? A. Yes.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same date.)

[115]

Los Angeles, California
Tuesday, May 28, 1940
2:00 o'Clock P. M.

J. LESLIE MORRIS

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination
(Continued)

By Mr. Meserve:

Q. Mr. Morris, you have called to my attention since the adjournment, corrections which you desire

(Testimony of J. Leslie Morris.)

to make in your testimony, your answers in response to questions this morning; first, as concerning your business; will you state what that was that you wanted?

A. I was asked a question, I believe, as to where we have branches. I was a little confused. This is my first time on the witness stand. I said New York, Columbus and Chicago. I forgot entirely Seattle and Portland. I would like to supply Seattle and Portland in addition to that.

Q. You wanted to correct your testimony, did you, as to what else you did to the connecting rod, other than rebabbitt it?

A. You asked me the question: "Rebabbitting is the only thing that you do to the connecting rod?" And I said, "Yes." As a matter of fact, the legend and the pictures show [116] that we push a new bushing into the upper end of the connecting rod; so I want to correct that.

Q. You are pointing to the small end of the connecting rod, Exhibit 34?

A. On Exhibit 34.

Q. And you had a third note?

A. The Court asked me about straightening or aligning the connecting rod, and he asked me: "Do you?" and I took it in the present tense, and I answered "No." That statement is correct so far as it goes, but I forgot we were talking about periods six or seven years ago, so I want to correct that to say that we attempted to construct three or four

(Testimony of J. Leslie Morris.)

different little devices for aligning the connecting rod. One was a little electric attachment that had a light, and if the rod was misaligned, when wt put it on there, the light would burn. That we found was an unnecessary operation, because if we did align the connecting rod, the garageman or mechanic later has to attach the piston to this connecting rod before he can install it in the engine.

The very first operation he has to do when he attaches the piston to the connecting rod is to align the whole assembly, because, after all, the alignment is not so much between the parallel axis and the shaft, but between the perpendicular wall of the cylinder, the piston standing down there perpendicularly at right angles to the axis of the crank shaft; so the operation we were doing we found had to [117] be repeated before the connecting rod could be installed in the engine, so there is no need for us to do it in our place. I want to make that correction.

Mr. Meserve: Mr. Reporter, will you be kind enough to read the Court's question and the witness' answer which appears on page 93 of your notes?

(The record referred to was read by the reporter, as follows:

"The Court: Then 60 or 65 per cent—let us put it in larger figures—would consist of the delivery to your customer of a rod that had either been processed in your establishment, or a new rod that had been obtained by you from one of those dealers?

(Testimony of J. Leslie Morris.)

"The Witness: That is exactly correct, yes, sir.")

By Mr. Meserve:

Q. Now, is that answer correct, Mr. Morris, as you reflect on it?

A. That is a little confusing. I don't know yet just exactly what the Court wanted on that point. I am just a little confused. Maybe if you would read the question previous to that it would help me.

Q. With your Honor's permission, I think I can clear up the witness' mind what the Court was seeking information on. What per cent, Mr. Morris, of rods used in your business are new rods or rods that you purchase and repair [118] and place in stock for service?

A. What per cent of what, sir?

Q. Of the total volume of your sales business.

A. About five per cent per month.

Q. And the remaining 95 per cent——

A. Now, I am following you.

Q. —consist of what?

A. The remaining 95 per cent of our business consists of connecting rods that we receive, babbitt and return to the customers. I say customers collectively, because I don't want to leave the impression that the connecting rods go directly to the same parties who sent them in. In other words, if we receive in this morning's shipment from five or six different jobbers, let us say, seventy-five Chevrolet connecting rods, this afternoon or tomorrow morn-

(Testimony of J. Leslie Morris.)

ing those shipments will go back; the 75 connecting rods will be of the Chevrolet type; that is, of the same 75 that came in the previous morning, the 75 connecting rods will be on their way back to the six or seven or eight or ten customers I mentioned, but I wouldn't say that the identical Chevrolet rod that came from one customer goes back to that same customer, because they are all exactly alike. Unless we put some mark on them, it would be physically impossible for us to tell who they came from, except we have the others waiting in the stockroom to go out.

Q. The five per cent of the total of the 100 per cent [119] based on your total sales represents connecting rods that you purchase either new from automotive representatives, or second-hand ones from people who deal in second-hand rods?

A. Yes, sir.

Q. That is, both together total five per cent?

A. Both together total less than five per cent, I might say.

Q. And that five per cent of your total business, Mr. Morris, is occasioned by what practice?

A. What makes it necessary?

Q. Yes.

A. Demands from jobbers who haven't yet, or wholesalers who haven't been able to stock their shelves with the late type of connecting rods, and they depend on us to ship them to them. You men-

(Testimony of J. Leslie Morris.)

tioned this morning Fresno. If the wholesaler in Fresno we are speaking of, has an order which comes over his counter for a set of '40 connecting rod exchanges, he has the old connecting rods, but the garageman has brought them in to him; he is in Fresno, and he wants as fast service as he can get on them; so he immediately wires us—telegraphs us or phones us to ship him these connecting rods. I ship them to him, but in that turnover I am compelled to buy the late connecting rods to the extent of the less than five per cent of the total babbitting I mentioned. [120]

Q. Then, if I understand it correctly, the five per cent of rods you are obliged to purchase, both of new and second-hand, represents the lag or space of time that it would require the rods that come in in the morning to go through and be babbitted, and be back out on the shelf. Is that correct?

A. That is right. You might call it the slack.

Q. To take up the slack? A. Yes.

Q. It is a fact, is it not, Mr. Morris, that in many instances, or in some instances, you do rebabbitt and deliver back the actual rod received from the customer?

A. In a great many instances.

Q. And that represents about what per cent of the total?

A. Let us say 10 per cent, because usually those rods that go directly back to the customer arise from the instructions that are on the order. Frequently

(Testimony of J. Leslie Morris.)

they say, "Same rods back." On other occasions they are machined—babbitted by us; the babbitt is poured to a size to fit a particular crankshaft that has been ground, so a standard rod would be useless to them; so naturally we babbitt the same rods and send them back to them.

Q. And it is also occasioned, is it not, from unusual types of rods, such as come out of tractors and large Diesel motors? [121]

A. Yes, that's right; expensive rods. There are some connecting rods—for instance, some rods we babbitt for three or four dollars each, which the cost of the rod alone would be around forty to buy the rod outright; but nobody wants to do that. Our files are full of letters—they have even wired, for a certain type of rod, and we write or wire right back, "Unable to secure. Send us rods in for rebabbitting." We can't give service on those rods, because they cost too much, and we can't expect the turnover of those we receive in exchange.

Q. Mr. Morris, is there a distinction in the automotive industry, and your particular branch of it in particular, between a damaged or injured connecting rod and one that is worn?

A. Definitely.

Q. What is the distinction?

A. The one that is merely worn requires rebabbitting. The one that is damaged—what is the other word you used—damaged or——?

Q. Or injured.

(Testimony of J. Leslie Morris.)

A. Or injured, why, it's not fit for further service.

Q. A worn connecting rod that comes into your plant for rebabbitting can operate in an internal combustion motor? A. Yes.

The Court: Cannot be, you say? [122]

Mr. Meserve: Can.

The Witness: It can operate, yes.

Q. The rebabbitting is for building up the bearing so it will operate more efficiently?

A. Preserve the oil pressure, and things of that sort. It will function. In fact, I suppose 95 per cent of the automobiles that pass this building right now, the bearings are too loose, but they are still running just the same.

Q. Can you tell us, Mr. Morris, when you are buying connecting rods, to meet this five per cent that you have defined, approximately what the average cost of those connecting rods is; not the new one, but the second-hand one—about what the average cost is?

A. The average cost would be in excess of $1.00, I would say; possibly $1.50. I haven't prepared figures on that, so I would guess between $1.00 and $1.50 would be our average cost.

Q. What would be the range of cost of the popular types?

A. From $1.00 to $3.50.

Mr. Meserve: Mr. Jewell, do you care to have any further evidence on that? I am merely asking

(Testimony of J. Leslie Morris.)

you. We have here specimen invoices, if you would like to have them in the record on this phase of the evidence. Pardon me, your Honor, I should have asked permission to address counsel. [123]

Mr. Jewell: Will the Court permit me to examine these a moment?

Mr. Meserve: It is merely to substantiate the statement of fact made by the witness.

Q. Mr. Morris, I will show you what appear to be invoices addressed to the J. Leslie Morris Company, a group of them, and ask you to examine them and tell us what they are, please.

A. These are invoices for connecting rods purchased from Mr. LaVine, a gentleman who deals in this type of commodity, and I recognize it. He is so familiar with us down there that he uses the name "Pete," but we all know him as Mr. LaVine. It represents sales to us of connecting rods to be rebabbitted, which are other than brand new. They have been removed by like establishments, or by someone from where he secures them, and carefully selected to see that there is nothing wrong with them, because when we are paying $1.90 or $1.60——

Q. Mr. Morris, will you answer the question?

A. Yes. That is what they are.

Q. Look through the group of invoices I have handed you, and advise us if that is a fairly representative type as to cost.

A. Yes, it is.

Q. Of the rods that you purchased to fill in the five per cent of the rods that you rebabbitt. [124]

(Testimony of J. Leslie Morris.)

A. Second-hand rods, yes, sir, that is correct.

Q. What, Mr. Morris, would be the approximate average weight of a connecting rod that would be of a popular type?

A. I would say the average weight would be around two or two and a half pounds each.

Q. The smaller ones, of course, are lighter than the larger ones? A. Yes.

Q. But those that you purchase in the five per cent will average——

A. Two or two and a half pounds each.

Mr. Meserve: We will offer the invoices together, as one exhibit.

The Clerk: Plaintiff's Exhibit 43 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 43.")

ORDER No. _____ DATE Sept 35 19__

M. Louis Morris Co. Inc.

1261 S. Hope St.

SHIP TO

AT L. A.

HOW SHIP

TERMS Net WHEN

SALESMAN BUYER M. Morris

12	647-	1.60	✓	19	20-
60	1034-	.55	✓	31	50
12	633-	1.35	✓	16	20
6	648-	2.00	✓	12	00
12	500-	1.25	✓	15	00
24	539-	1.25	✓	30	00
8	580-	1.50	✓	12	00
12	488-	1.25	✓	15	00
12	534-	1.00	✓	12	00
2	579-	2.50	✓	5	00
		Net		167	90

SEP 9 1935 O.K.

No. 433-H Civ.
Morris Co.
vs.
Pltf. USA
Dfts. EXHIBIT
No. 43.
Filed 5/28 1940
R. S. ZIMMERMAN, Clerk
By B B Hansen
Deputy Clerk

No. 9716
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
MAR 27 1941
PAUL P. O'BRIEN
CLERK

(Testimony of J. Leslie Morris.)

Mr. Meserve: And with the right, Mr. Jewell, if we elect, subject to the approval of the Court, to substitute copies in lieu of the originals, if we would like to keep them in our permanent record.

Mr. Jewell: That is perfectly acceptable to me.

By Mr. Meserve:

Q. Are you familiar, Mr. Morris, with the going price of junk, that would be junk occasioned by damaged connecting rods not further usable, or that type of steel, during the period in question? [125]

A. Yes, I would be.

Q. What, approximately, was the going price of junk?

A. It was very low at the beginning of this period, and it increased, I would say, from eight to ten dollars per ton.

Q. What would you say was the highest price junk brought during that period?

A. Scrap forging steel, is what you mean?

Q. Yes, scrap forging steel.

A. I would say the top price would have been $11.00 a ton.

Q. During the course of your business, Mr. Morris, you have published a price list for your trade of the prices charged for rebabbitting the various types of rods? A. Yes, sir.

Q. I will show you, Mr. Morris, one of the earliest in date, and ask you if that is a copy of your published price list that was effective as of the date that appears on its face. A. That was, yes.

(Testimony of J. Leslie Morris.)

Q. Can you briefly for us, Mr. Morris, so that it can be made intelligent in the record, define the symbols that appear on the inside of the price list, by just taking any one item; and those apply the same as to all items, except a variance in the price, do they not? A. That's true. [126]

Q. Just explain it.

A. This is a net price sheet to the wholesaler; that is the wholesale merchant, I believe I have spoken of him as; stock No. 2, net rebabbitting, $1.80; net rod, 50 cents; net complete is the sum of the two, $2.30.

Q. Taking the first item in the first left-hand column of the document that you are looking at, which is No. 2. That is your stock number?

A. Yes, sir.

Q. And you have a catalog that identifies that by its stock number? A. Yes.

Mr. Meserve: We will offer in evidence as Plaintiff's Exhibit next in order the identified price list effective May 15, 1931.

The Clerk: Plaintiff's Exhibit 44 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit 44.")

By Mr. Meserve:

Q. I show you a similar document that is dated effective August 1st, 1932. Would your testimony be the same as to that, except that it is a later price list?

(Testimony of J. Leslie Morris.)

A. Exactly the same, yes, sir. That is the price list we used at that time.

Mr. Meserve: We will offer the document that was last identified by the witness as Plaintiff's next exhibit in [127] order.

The Clerk: Plaintiff's Exhibit 45 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 45.")

PLAINTIFF'S EXHIBIT No. 45

Revised
Confidential Net Prices for Authorized
Jobbers Only

Effective August 1st, 1932

[National Standard Parts Association Emblem]

Moroloy
Connecting Rod and Main Bearing
Rebabbitting

J. Leslie Morris Co., Inc.
"Coast to Coast"

National Rebabbitters to the Automotive
Parts Jobber

Moroloy Bearing Service

Moroloy Bearing Service
655 W. 55th St.
New York City

(Testimony of J. Leslie Morris.)

Moroloy Bearing Service
69 N. Tenth St.,
Portland, Ore.

Moroloy Bearing Service
11 So. Ninth St.,
Minneapolis, Minn.

Moroloy Bearing Service
1361 So. Hope St.,
Los Angeles, Cal.

Moroloy Bearing Service
162 No. Fourth St.,
Columbus, Ohio

Moroloy Bearing Service
296 Ivy St., N. E.,
Atlanta, Ga.

Moroloy Bearing Service
606 Santa Fe Drive,
Denver, Colo.

Moroloy Bearing Service
2712-16 So. State St.,
Chicago, Ill.

Moroloy Bearing Service
2354 Valley St.,
Oakland, Cal.

Moroloy Bearing Service
1516 Thirteenth Ave., W.,
Vancouver, B. C.

(Testimony of J. Leslie Morris.)

Moroloy Bearing Service
1934 Broad St.,
Regina, Sask.

Moroloy Bearing Service
10 So. Davis St.,
Jacksonville, Fla.

Moroloy Bearing Service
310 North Laurel St.,
Richmond, Va.

Moroloy Bearing Service
1520 Tenth Ave.,
Seattle, Wash.

Moroloy Bearing Service

Stock No.	Net Rebab.	Net Rod	Net Comp.
2	1.80	.50	2.30
6	1.80	.75	2.55
7	1.80	.75	2.55
12	2.00	7.00	9.00
14	3.00	10.00	13.00
15	4.80	13.00	17.80
17	1.05	.25	1.30
18	1.05	.25	1.30
19	1.05	.25	1.30
20	1.05	.25	1.30
25	1.05	.25	1.30

* * * * * * *

This confidential net price list is issued for the convenience of your purchasing department.

(Testimony of J. Leslie Morris.)

The "Net Rebabbitting" is charged when the old rod is offered in exchange. The "Net Complete" price is charged when the old rod is not offered in exchange, but promised later. The "Net Rod" charge is credited upon receipt of the old rod.

The "Net Complete" charge is also applicable to the outright purchase of connecting rods.

We ask that the exchange rods to cover those sent out as "Complete" be returned to us fifteen days from date of shipment.

Connecting rods rebabbitted to specified undersizes are subject to an additional charge of 50¢ net per rod.

Defective forgings will not be rebabbitted but will be returned to the sender.

We are equipped to rebabbitt all types of connecting rods and main bearing caps not listed.

We reserve the right to correct listings of connecting rods sent us for rebabbitting.

All prices are subject to change without notice.

Industrial and Special
Automotive Bearings

Wholesalers receive 60% discount on special bearings

MOROLOY BEARING SERVICE

[Endorsed]: Plaintiff's Exhibit No. 45. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. That is the one effective 1332. I will show you a similar one, Mr. Morris, that is dated effective April 15th, 1933, and ask if your testimony would be the same as to that.

A. My testimony is the same as to that, yes, sir. That is the net price sheet at that time.

Q. For the time of the last one?

A. Yes, it's the same.

Mr. Meserve: We will ask the Court to mark the one effective April 15, 1933, as the next exhibit in order.

The Clerk: Plaintiff's Exhibit 46 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 46.")

Mr. Meserve: And the one effective September 24, 1934, as 47.

The Clerk: Plaintiff's Exhibit 47.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 47.")

(Testimony of J. Leslie Morris.)

PLAINTIFF'S EXHIBIT No. 47

Moroloy
Western Babbittors Association
Jobbers' Confidential Net Cost Prices
for
Connecting Rod and Main Bearing
Cap Rebabbitting
Also Net Forging Deposits
Effective September 24, 1934

The net rebabbitting is charged when the old rod is offered in exchange.

The net forging price is charged in addition when the old rod is not offered in exchange.

The net forging charge is credited upon return of the old rod to us.

We ask that the exchange rods to cover those sent out, be returned us within fifteen days.

Forgings rebabbitted to specified undersizes are subject to an additional charge of 30c each.

Defective forgings will not be rebabbitted, but will be returned to the sender.

We are equipped to rebabbitt all types of connecting rods and main bearing caps not listed.

We reserve the right to correct listings of forgings sent us for rebabbitting.

All prices are subject to change without notice.

Form 1-A

[Endorsed]: Plaintiff's Exhibit No. 47. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. These documents that have just been introduced in evidence, Mr. Morris, were all of the price lists [128] published and in effect during the period involved in this case, from 1931 to 1934?

A. Yes, sir.

Q. I will show you, Mr. Morris, a document dated 1932, and ask you to identify it.

A. This is our sheet that goes to the jobber to help him to identify the connecting rod.

Q. Do you describe it as a catalog?

A. We call it a catalog, yes. That is the catalog in effect at that time.

Q. I will show you a similar one of 1933.

A. That is our publication, yes.

Q. And those were the two catalogs that were in effect with and at the same time as the price lists and during the time involved in this case?

A. Yes.

Mr. Meserve: We will ask that the one of 1932 be marked as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 48.

Mr. Meserve: And the one 1933——

The Clerk: Plaintiff's Exhibit 49.

(The documents referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 48 and 49," respectively.)

(Testimony of J. Leslie Morris.)

PLAINTIFF'S EXHIBIT No. 49

MOROLOY

Bearing Service
Rebabbitted Connecting Rods
1933

Moroloy Bearing Service
National Rebabbitters
Features of 1933!!!!

Jobber's Inventories Reduced

Rights and Lefts Now Interchange

Jobbers need no longer stock both rights and lefts to service off-set pressure feed Connecting Rods. By our exclusive manufacturing practice, developed for 1933 conditions . . .

Jobbers Now Reduce Inventories
50% on These Numbers

Obsolescence Protection
and
Stock Control

Again 1933 conditions demand protection of Jobber's Investments. Moroloy has met the situation with an Obsolescence and Stock Control Plan, which guarantees complete and continuous protection of the Jobber's Connecting Rod Investment. Details on request.

(Testimony of J. Leslie Morris.)

Moroloy Connecting Rods Are Centrifugally Bonded and Automatically Machined to Duplicate Original Equipment

Casting

Moroloy Centrifugally Processed Rods meet engineering specifications of original car and motor manufacturers.

This process deposits babbitt on the tinned surface under extreme centrifugal pressure, assuring an absolute bond between babbitt and steel, that is not obtainable by the old fashioned hand poured method.

Centrifugally processed connecting rods are endorsed by the Society of Automotive Engineers and are used exclusively by the following manufacturers:

Auburn, Buick, Continental, Cord, Chrysler, De Soto, Dodge, Durant, Elcar, Essex, Gardner, Graham, Hudson, Hupmobile, Jordan, Kissel, Lycoming, Marmon, Plymouth, Ruxton, Studebaker, Stutz, White, Willys-Knight, and Windsor.

"If It's Not Centrifugally Cast—It's Not a Factory Duplicate

Automatic Pyrometers

To regulate the temperature of rods, tin and babbitt, the Moroloy Centrifugal Process eliminates human element entirely. Heat control is obtained by approved automatic pyrometers.

(Testimony of J. Leslie Morris.)

Machining and Finishing

Moroloy machining and finishing is accomplished with the same engineering exactness, following closely the recommendations and usages of leading original manufacturers.

Modern high compression engines demand close tolerances, both in bearing diameter and width. Of equal importance is proper length spacing. Moroloy precision tools are automatic in maintaining exact length dimensions between center of piston pin and center of crankshaft.

Moroloy processed rods are straightened, cleaned and serviced with new bolts, nuts, shims and piston pin bushings. Oil Clearance allowed. No scraping nor reaming required.

Electrical alignment is an exclusive Moroloy feature.

For Quick, Simple and Proper Installation, Insist on Moroloy

The extra quality built into every rod means longer life, trouble free operation and Owner Satisfaction, the factors most important in building your business.

Service

Fifteen manufacturing plants, located at strategic points over the United States and Canada, render a coast to coast service, convenient to every jobbing center. Ample stocks at all branches assure same

(Testimony of J. Leslie Morris.)

day shipment. Telephone and telegraphic orders receive instant attention.

Moroloy Bearing Service
J. Leslie Morris Co., Inc.
"Coast to Coast"

National Rebabbitters to the Automotive Parts Jobber

Owned and Affiliated Stations Operating in the following Cities—

655 West 55th St.,
New York City, N. Y.

1361 So. Hope St.,
Los Angeles, Calif.

2354 Valley St.,
Oakland, Calif.

69 North Tenth St.,
Portland, Ore.

296 Ivy St. N. E.,
Atlanta, Ga.

2712-16 So. State St.,
Chicago, Ill.

162 N. 4th Street,
Columbus, Ohio

11 So. Ninth St.,
Minneapolis, Minn.

(Testimony of J. Leslie Morris.)

606 Santa Fe Drive,
Denver, Colo.

1516 Thirteenth Ave., W.
Vancouver, B. C., Canada

1934 Broad St.,
Regina, Sask., Canada

10 S. Davis St.,
Jacksonville, Fla.

1520 10th Ave.,
Seattle, Wash.

310 N. Laurel St.,
Richmond, Va.

Table of Contents

(Testimony of J. Leslie Morris.)

Special Sizes

To fit Reground Crankshafts, Connecting Rod and Main Bearings are finished to micrometer dimensions at an extra charge of seventy-five cents (75¢) per bearing. This charge is Net and should be added after making deduction of regular trade discounts.

Specify exact micrometer size of reground crankshaft.

Industrial and Special Automotive Bearings

To determine list prices for rebabbitting Industrial and Automotive Main Bearings (Bronze or Steel Backs) and Connecting Rods not listed in this hand book:

Measure length of bearing over all. Bearings under 2½″ diameter and 3″ in length, charge $3.50. This price is net, not subject to trade discounts. Ask for quotations on larger bearings.

Undersize charge per unit applicable in addition if special size.

(Testimony of J. Leslie Morris.)

Abbreviations:—"C"—Pin clamps in rod. No bushing. "B"—Pin floats in rod. Bushing used. "FFP"—Pin floats in rod and piston. Bushing may or may not be used.

Note—All rods marked thus * are special jobs and are not stocked for exchange. Rods not carried in stock must be sent in for rebabbitting. Bushings, shims, bolts and nuts charged for extra on all special rods requiring these parts new. Modern facilities guarantee the fastest possible service.

Do not accept rods for exchange that are bent, cracked or mutilated.

SECTION I

ALPHABETICAL LIST
REBABBITTED CONNECTING RODS
ARRANGED BY NAME OF MOTOR

Notice to Salesmen: (1) When old rod is offered in exchange, use Column "A" prices, subject to trade discounts. (2) When old rod is not offered in exchange, but promised later, add Column "B" prices NET. Upon return of old rod refund Column "B" prices NET.

Name	Year and Model	No. on Rod	Stock No.	"A" List Price Rebabbitting	"B" Net Forging Deposit	Bearing Size Diam.	Bearing Size Width	Pin Size and Type	
A. C. F.	Bus, 17-30 Pass. 1927-32	HM-64-65 H-9789	258	6.00	*	2¼	2 7/16	1¼	B
A. C. F.	Bus, 17-23 Pass. 1931, 6 Cyl.	18090-B	525	3.50	6.00	2¼	1½	1⅛	C
A. C. F.	Bus, 21-29 Pass. 1931-32, 6 Cyl.	15090-B	526	3.50	6.00	2½	1¾	1¼	C
Acme	2 Tons, 1927-29	8UD-502	242	3.00	3.00	2⅛	1⅜	1	B
Acme	2 Tons, 1928-31	8UD-505	524	3.00	3.00	2⅛	1⅜	⅞	B
Acme	4½-7½ Tons, 1925-31 (oil line integral)	B5D-501	505	7.50	17.00	2⅝	3	1½	B
Acme	Bus & Truck 3½-6 Tons, 1926-29	7TD-500	425	5.00	10.00	2½	1 13/16	1¼	B
Acme	7 Tons, 1928-31	26HD-501	631	6.50	16.00	3	2⅛	1½	B
Acme	3½-7 Tons, 1928-31, 6 Cyl.	7TD-500	425	5.00	10.00	2½	1 13/16	1¼	B
Acme	¾, 1 Ton, 1926-31, 6 Cyl.	9LD-504	163	2.50	2.00	2	1⅛	.860	B
Acme	3, 4 Tons, 1929-31, 6 Cyl.	20RD-501	527	3.50	7.00	2½	1 13/16	1¼	B
Acme	2½, 3 Tons, 1929-31, 6 Cyl.	16RD-500	615	3.50	7.00	2⅜	1 13/16	1¼	B
Acorn	1, 2 Tons, 1927-31	8UD-505	524	3.00	3.00	2⅛	1⅜	⅞	B
Acorn	2½, 3 Tons 1927-31	WSE-2	449	5.00	10.50	2½	1⅞	1⅜	B
Ajax	1926, 6 Cyl.	2120-A-4 15001	194	3.00	2.00	1⅝	1 5/16	¾	B

[Endorsed]: Plaintiff's Exhibit No. 49. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. Taking, Mr. Morris, just for elucidation, page 3 [129] of Exhibit 49,—and the system used in the catalog and the price sheet is the same, regardless of the year?

A. The system used is the same.

Q. I direct your attention—and this is only just to elucidate the whole matter—to Chevrolet 1932, six cylinder, on page 3, Section 1, and will ask you to explain to us what appears in the next column.

A. That is the serial number.

Q. And that is the number, is it, that appears?

A. On the forging, on the shank of the connecting rod, yes. That is the number that is raised in the die of the connecting rod.

Q. Then in the next column following that?

A. The 516 is our stock number.

Q. And that 516 is the same 516 that appears on the price sheet?

A. Yes, in the net price sheet.

Q. And that is the adopted plan of the catalog all the way through? A. Yes.

Q. The names appearing in the left-hand corner are of the motor manufacturers?

A. That's right.

Q. The stock number that appears in the catalog, and appears in the price sheet, whereabouts does it appear in connection with your business?

[130]

A. On the end of the box in which we pack the connecting rods.

(Testimony of J. Leslie Morris.)

Q. On the carton in which you ship it?

A. On the carton in which we ship it, yes.

Q. You do not put that stock number at any time on the connecting rod itself? A. No.

Q. Or any other identification mark?

A. No.

Q. I believe you testified this morning you did not remove any identification mark that appears on the rod? A. None whatever.

Q. And never have? A. And never have.

Q. Mr. Morris, I will show you a red carton that is produced from your business, and ask you if that is the carton that you just last referred to in your evidence, in which you packed or shipped the re-babbitted rods?

A. This is the carton in which we shipped the rebabbitted rods at the time of the period we speak of.

Q. That was what I was going to qualify next. That is the type used during the time involved in this case? A. Yes.

Mr. Meserve: We will ask the Clerk to mark this as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 50. [131]

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 50.")

By Mr. Meserve:

Q. Referring to Plaintiff's Exhibit No. 50 that you have just identified, Mr. Morris, I will direct

Stock No.
315
MOROLOY
REBABBITTED CONNECTING RODS
CENTRIFUGALLY CAST
ACCURATELY MACHINED

(Testimony of J. Leslie Morris.)

your attention to a number that appears on the end, 315, and ask you to tell us what that is.

A. That is the connecting rod for a Pontiac-6.

Q. What is 315?

A. That is the number again that is in our so-called catalog and price sheet; net sheet; our identifying number.

Q. That is your identifying number?

A. Yes.

Q. And, except as to the change in numbers, is the system used the same, each number referring to the particular type of connecting rod, is that correct? A. That is correct, yes.

The Court: What is the inscription, "Fac. No. 691"? I am reading from Exhibit 48. Is that the factory number?

The Witness: That is the factory number that is on the shank of the rod. That is the same number we have been referring to all the time.

The Court: The factory number of the original manufacturer, whether a Buick, or Chevrolet, or what it is?

The Witness: The factory number that appears on the shank of the rod. Your Honor, that is not always the stock [132] number. Sometimes that varies, but this number that appears on the shank of the rod, we put that merely for identification so they will know what rod we are talking about; what rod they are to receive; what rod they will require; because about the first thing a garageman does when

(Testimony of J. Leslie Morris.)

he takes a rod out is to look at the number; not our stock number, but the number on the connecting rod itself. He goes to his wholesaler and says, "Give me one like that."

The Court: Is that——

The Witness: That is the factory number.

The Court: Not your number?

The Witness: Not my number. That's right, yes. [133]

HARRY W. PATTIN

a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined, and testified as follows:

The Clerk: You will state your full name to the court.

The Witness: Harry W. Pattin.

Direct Examination

By Mr. Meserve:

Q. Mr. Pattin, where do you reside?

A. 2107 Ames Street, Los Angeles.

Q. What is your business or profession?

A. I am a certified public accountant.

Q. And you are licensed to practice your profession in the State of California? A. I am.

Q. How long have you been a certified public accountant? A. Since 1925.

Q. You have performed professional services for the plaintiff corporation in this case?

(Testimony of Harry W. Pattin.)

A. I have. [142]

Q. The J. Leslie Morris Company?

A. Yes.

Q. When did you first perform any accounting services for that corporation?

A. In July, 1933.

Q. And it consisted of what?

A. At that time I had to go back for about a year or a year and a half to audit the books. Since then I have prepared the financial statements, tax returns, and various other special matters.

Q. And you made the annual audit?

A. Yes, I did.

Q. And have made your own examination of the books of the corporation? A. Yes, I did.

Q. For the period through the year 1931?

A. Well, not very extensively back of 1931, although I did see enough of the books and the tax returns to satisfy me that the books were correct.

Q. I show you, Mr. Pattin, a document entitled "Financial Statement, J. Leslie Morris Co., Inc.," for December, 1931, and ask you if you can identify that document. A. Yes, I can.

Q. State what it is, please.

A. This is the balance sheet showing the assets and [148] liabilities of J. Leslie Morris Company, Inc., as of December 31, 1931.

Q. That was prepared, was it, before you became affiliated, or worked professionally for the company? A. Yes, it was.

(Testimony of Harry W. Pattin.)

Q. But since you have been their accountant, you have verified the figures that are indicated on that statement, with the books of the corporation, and determined whether they are correct or incorrect? A. Yes, I did.

Q. What did you find in that particular? That they were correct?

A. Yes, I found they were substantially correct. There was one slight change made after a Federal auditor examined this, a slight change in the rate of depreciation; not very substantial.

Q. In the rate of depreciation?

A. That's right.

Mr. Meserve: We will offer in evidence the document, identified by the witness as Plaintiff's next exhibit in order, being the assets and liabilities or financial statement.

The Clerk: Plaintiff's Exhibit 51 in evidence.

By Mr. Meserve:

Q. I will show you a second document, Mr. Pattin, entitled "Statement of Operations," and ask if you can [149] identify that document.

A. Yes, this shows the result of operations of J. Leslie Morris Company for the year from January 1, 1931 to December 31, 1931.

Q. Are you familiar with the statement?

A. Yes, I am.

Q. Have you verified the figures thereon from the books since you have been the accountant for the company?

(Testimony of Harry W. Pattin.)

A. Yes, I know they are based on the books and records; taken from the books and records.

Mr. Meserve: We will offer the profit and loss statement,——

Q. This is a profit and loss statement you have just identified? A. That's right.

Mr. Meserve: —as Plaintiff's next exhibit in order.

The Clerk: Plaintiff's Exhibit 52 in evidence.

(The documents referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 51 and 52," respectively.)

By Mr. Meserve:

Q. Examine Plaintiff's Exhibit 52, Mr. Pattin, will you, and tell us what the result of the J. Leslie Morris Company operation was for the year 1931, as to whether it operated at a profit or loss?

A. It shows a net loss of $3370.07. [150]

Q. And that includes all of its operations, whether here or in any of its various then existing branches?

A. That's right. That's the entire concern.

Q. Have you, since observing the result of this statement, checked the books to verify whether that loss actually existed or not, as shown by the books?

A. Yes, I did.

Q. And you found it to be correct?

A. Yes.

Q. That it was a net loss of operation for that year? A. Yes.

(Testimony of Harry W. Pattin.)

Q. I will show you another document entitled "Financial Statement, December, 1932," and ask you if that document that you are now examining is similar to Plaintiff's Exhibit 51, except for the year 1932. A. Yes, it is.

Q. Did you have occasion to verify the figures and facts therein contained, from an examination of the company's books? A. Yes, I did.

Q. What did you ascertain?

A. That these figures were taken from the books and records of this company.

Q. And truly reflect the condition as indicated from the books? [151] A. Yes.

Mr. Meserve: We will offer the financial statement for the year 1932 as Plaintiff's Exhibit 53.

The Clerk: 53 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 53.")

By Mr. Meserve:

Q. I will show you a "Statement of Operations," January 1, 1932 to December 31, 1932, and ask you if you identify that as being a similar statement to Plaintiff's Exhibit 51, except for the year 1932. A. Yes, it is similar.

Q. And have you verified the facts and figures indicated on the statement, from the books and records of the corporation?

A. Yes, I did.

Q. And do they truly reflect the condition of

(Testimony of Harry W. Pattin.)

the company as indicated by the books and records? A. They do.

Q. What was the result of the operations of the company for the year 1932?

A. A net profit of $4574.73.

Q. Was that net profit computed on taking into consideration the same elements that the net loss was determined on the preceding year?

A. Yes. [152]

Q. All of the same phases of operation in all of the various plants of the company?

A. That's right. It is the net result of the entire corporation.

Mr. Meserve: We will offer this statement as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 54 in evidence.

By Mr. Meserve:

Q. I will show you a statement: "Balance Sheet," dated December 31, 1933, and ask you if you can identify that document.

A. Yes, that is the balance sheet of this company as of December 31, 1933.

Q. Who prepared that?

A. I prepared this myself.

Q. From the books? A. Yes.

Q. Was there anything else that you did to verify it? I assume that you checked against the bank records?

A. Yes, I audited the books. I make a continuous audit. I am down there at least once a week.

(Testimony of Harry W. Pattin.)

Q. And that is a correct statement of the company as of that period, is it? A. It is.

Mr. Meserve: We will offer the balance sheet for 1933 as Plaintiff's Exhibit [153]

The Clerk: 55.

(The documents referred to were received in evidence and marked "Plaintiff's Exhibits Nos. 54 and 55," respectively.)

PLAINTIFF'S EXHIBIT NO. 55

J. Leslie Morris Co., Inc.

BALANCE SHEET

December 31, 1933

Assets	Total	Los Angeles	Portland Seattle	Chicago	Columbus	New York
*	*	*	*	*	*	*

[Endorsed]: Plaintiff's Exhibit No. 55. Filed 5/28/1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

By Mr. Meserve:

Q. I will show you a profit and loss and income statement dated December 31, 1933, and ask you if you identify that?

A. Yes, that's the statement of income, profit and loss, for this company, for the year 1933.

Q. Who prepared it? A. I did.

Q. From the books and records of the corporation? A. Yes.

(Testimony of Harry W. Pattin.)

Q. What does the result show for that year?

A. It shows a net loss of $2258.07.

Q. And was that based upon the same method of calculation of profit and loss that is indicated in this statement for the years 1931 and 1932?

A. Yes, it was.

Mr. Meserve: We offer the document last identified by the witness as Plaintiff's exhibit.

The Clerk: 56 in evidence.

(The document referred to was received in evidence and marked as "Plaintiff's Exhibit No. 56.") [154]

By Mr. Meserve:

Q. The statement that I now hand you, being balance sheet for the year 1934, your testimony is the same as to that, Mr. Pattin, as it was for the previous similar statement for the year 1933?

A. Yes, it is.

Q. You prepared it?

A. I prepared it from the books and records.

Q. And from your audit?

A. That's right.

Q. And it is correct? A. Yes.

Mr. Meserve: We offer the balance sheet for the year 1934 as Plaintiff's Exhibit 57.

The Clerk: Plaintiff's Exhibit 57 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 57.")

(Testimony of Harry W. Pattin.)

By Mr. Meserve:

Q. And I will show you a profit and loss and statement of income, December 31, 1934, and ask you if your testimony is the same as to that as it was to the one previously identified, except as to the year.

A. That's right. This covers the year 1934.

Q. What does that show as a result of the operation?

A. It shows a net profit of $5191.86.

Q. And no different method of calculation of income [155] or profit or loss was made in this year as against any of the preceding years?

A. No change in the method.

Mr. Meserve: We will offer the document identified as Plaintiff's Exhibit.

The Clerk: 58 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 58.")

By Mr. Meserve:

Q. I will show you a balance sheet of the corporation dated December 31, 1935, and ask you if that is a similar document, prepared by yourself, for that year, as you have testified to as the two preceding years. A. Yes, it is.

Q. You prepared it?

A. I prepared it after audit from the books and records of this company.

Q. And it is correct? A. It is.

(Testimony of Harry W. Pattin.)

Mr. Meserve: We will offer the balance sheet of December 31, as Plaintiff's Exhibit 59.

The Clerk: 59 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 59.")

By Mr. Meserve:

Q. This is a statement of income and profit and loss [156] for that same year? A. Yes.

Q. You prepared that, did you,

A. Yes, I did.

Q. From the same method and same form of procedure that you did for the years preceding, that you have testified to? A. Yes.

Q. And it is correct? A. Yes.

Q. What does that statement show as to the operations of the company for the year 1935?

A. It shows a net profit of $6,048.16.

Q. In your opinion that is correct?

A. It is.

Mr. Meserve: We will offer the statement last identified as Plaintiff's Exhibit.

The Clerk: Plaintiff's Exhibit 60 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 60.")

By Mr. Meserve:

Q. Did you make a calculation as to the percentage of gross profits for the years 1931 and 1933? A. Yes, I did.

(Testimony of Harry W. Pattin.)

Q. I will show you a document and ask you if that is a memorandum that you prepared in respect to the matters I [157] have just inquired of.

A. Yes, this is.

Q. State what it shows as to the percentages of gross profits for those two years, and just what you mean by that?

A. Well, now, I am comparing 1931 and 1933, 1931 being the first full year prior to this tax.

Q. The one involved in this case?

A. Well, prior to the time this tax became a law, 1933 is the first full year after the excise tax became a law. The gross profit for 1931 I found to be 24.5 per cent for 1933, and the gross profit I found to be 19 per cent, or a decrease or a lower gross profit in 1933 of 5½ per cent.

Q. And that, in face of the fact that the prices charged by the corporation for its services had been raised in that period?

A. Yes, despite that. Of course, I went still further to find out what caused this decrease in gross profit and it's practically entirely due to an increase in the cost of materials.

The Court: Those two items are the figures that should have been included there in the exhibits, I think 52 and *52,* where you made pencil notations, and did not put in the percentages? There are some changes here in these exhibits. I am referring now to Exhibit 52; there has been a change [158] there in the itemization?

(Testimony of Harry W. Pattin.)

The Witness: Yes, you see, that is one that was not prepared by me and the phraseology is different from the kind I would use.

The Court: Are these items which you gave in your testimony last—are they items that should be included in these various exhibits?

The Witness: Yes, those percentage figures are based on these figures here.

Mr. Meserve: Cross examine.

Cross Examination

By Mr. Jewell:

Q. What did you mean, Mr. Pattin, by percentage of gross profit?

A. Well, if an item sells for $1.00, and costs 65 cents, I would say the gross profit is 35 per cent.

Q. That is excluding depreciation, and so forth, in your computation?

A. Well, it excludes selling and administrative expenses. It does include labor on a process and the material used in the process, and those expenses directly connected with a process.

Q. What other items does it exclude?

A. It excludes selling expenses, salesmen's commissions, salesmen's salaries, packing supplies; it excludes all administrative expenses, like general insurance, [159] office salaries, officers' salaries, telephone, certain taxes, bad debts, office depreciation.

Q. You say you made an examination of the books of the company and found out that the in-

(Testimony of Harry W. Pattin.)

crease was what?——It was due to the increase in the cost of materials? I didn't catch that.

A. The decrease in gross profit was almost exclusively due to the increase in the cost of materials rather than labor or certain of these expenses that I charged to the process.

Q. Are all the books of the various affiliated branches of Plaintiff corporation kept in this city, at this office?

A. Not right now. We have changed methods several times, but right now we do get copies of the books of original entry from the other branches.

Q. What was the setup when you first started to perform professional services for Mr. Morris and the plaintiff corporation?

A. I believe they were all kept in Los Angeles at that time.

Q. Do you recall what the first change was—when it occurred?

A. I believe about four or five months after that; that was when they were separated into the different branches, and local bookkeepers and local accountants were [160] employed then.

Q. Any other changes?

A. Well, there have been changes since then. Now Los Angeles keeps the records for Portland and Seattle. Chicago now keeps the records for New York and Columbus as well.

Mr. Jewell: That is all.

Mr. Meserve: That is all.

(Witness excused.) [161]

J. LESLIE MORRIS

a witness recalled by and on behalf of the Plaintiff, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination [163]

Q. Mr. Morris, in your business, in rebabbitting, do you use old babbitt metal? A. Yes.

Q. As well as new?

A. As well as new, yes.

Q. That is, the babbitt that is on the rod as it comes in is melted out? A. Yes.

Q. And you keep it? A. Yes.

Q. And add new to it as it is needed, is that correct? A. That's correct.

Q. Introduced in evidence in this morning's session was Plaintiff's Exhibit 37, a connecting rod that I understood you to identify as being one to fit a particular type of Chevrolet, is that correct?

A. '37 Chevrolet.

Q. Are you able to state from an examination of Plaintiff's Exhibit 37 who the manufacturer of that rod was?

A. We are more or less familiar with all of the markings of the car manufacturers, and also other manufacturers than the car manufacturers. This rod is marked "C. B. 463." That is the stock number of Clawson and Bals of Chicago. [165]

Q. Will you spell the first name?

A. C-l-a-w-s-o-n and B-a-l-s, Inc.

Q. A concern in Chicago? A. Yes.

(Testimony of J. Leslie Morris.)

Q. Are you familiar with their business to the extent of having been in their plant? A. Yes. [166]

By Mr. Meserve:

Q. In your business, Mr. Morris, did you ever at any time purchase connecting rods for their value as junk steel or material alone?

A. I never did.

Q. The only connecting rods that you ever purchased [168] were ones that were either new or worn at the place where they needed rebabbitting?

A. Correct.

Mr. Meserve: That is all.

Cross Examination

By Mr. Jewell:

Q. How many affiliated plants did you say the Plaintiff corporation has, Mr. Morris?

A. Affiliated?

Q. Or associated.

A. Do you mean that are not owned by the company? Is that what you mean, plants that are not owned by the company?

Q. Over which the company has control, or some business connection. Tell me about your corporate setup in connection with other organizations doing a much similar line of business.

A. This corporation——

Mr. Meserve: If I can interpose an objection, your Honor——

(Testimony of J. Leslie Morris.)

The Court: Subsidiaries and affiliates?

Mr. Jewell: Thus far it was not brought out on direct examination the type of relationship that plaintiff corporation has with the other various business entities shown on the books. They may be subsidiaries; they might not be. I would like to know what that connection, or setup, it. [169]

A. The J. Leslie Morris Company, Inc. owns the plants in New York, Columbus, Chicago, Los Angeles, Portland, and Seattle.

Q. New York, Chicago, and Columbus?

A. Columbus, Ohio, Portland, Oregon, Seattle, Washington.

Q. And Los Angeles?

A. Los Angeles, yes—six.

Q. Those other plants, which you state the plaintiff corporation owns, are they corporations?

A. No, sir, all in the one corporation.

Q. In other words, you actually own the industrial unit?

A. Yes, it's just a part of this California corporation.

Q. I notice on some of the exhibits—52, 53, and 54, and so forth, the balance sheets, the names of some other units: Atlanta, Jackson, Richmond.

A. Jacksonville, Florida, that is. Those plants have been disposed of by the company. They were disposed of in—I will have to ask my accountant on that; I think it was 1931.

Q. I am looking at the 1931 return.

(Testimony of J. Leslie Morris.)

A. Yes.

Q. I see the name of the Atlanta unit appears on the balance sheet for 1932, so you must have disposed of it [170] some time during the year 1932, is that correct?

A. I can't answer that, Mr. Jewell. You will have to ask my accountant to refer to the books.

Q. Anyway, you don't own it now?

A. We do not own it now, no, sir. It was either '31 or '2, but I can't remember the exact time.

Q. These pictures, and the legend affixed beneath, relate your testimony of the process as it existed during the taxable period here involved, at 1361 South Hope, Los Angeles, California.

A. Yes.

Q. What line of business is your corporation engaged in in New York?

A. The equipment is much less.

Q. How about Chicago.

A. Chicago is better organized, and the equipment is just about identical with Los Angeles.

Q. Do you mean identical in size?

A. The tools, I mean; yes, identical in size. It has not the floor area; it is considerably smaller in floor area, but the same operations are done, and we babbitt just about the same number of connecting rods there as we do in Los Angeles.

Q. About what size would you say your shop is in Los Angeles?

(Testimony of J. Leslie Morris.)

A. I think it is 50 by 85, or thereabouts. That [171] does not include, of course, parking space out in front.

Q. Is it the largest as to floor space?

A. Yes, very much the largest one.

Q. Your physical offices are here in Los Angeles?

A. Yes, it is a California corporation; we started here.

Q. What is this establishment that you have out here in Boyle Heights?

A. That is crank shaft grinding and engine bearings.

Q. That is all that you turn out over there?

A. That's right.

Q. Do you have any warehouses, outside of the particular production units?

A. Operated by ourselves?

Q. Yes. A. No.

Q. Do you store in any warehouses?

A. We do store in warehouses, yes.

Q. Will you tell me where those warehouses are?

A. Yes, they are in Boston, Philadelphia—I am trying to get them in order so that I won't miss one: Kansas City, Minneapolis, New Orleans. They are handled by salesmen, and he just works on a commission. We have no part of the management of the business there at all.

Q. But you rent the warehouse?

(Testimony of J. Leslie Morris.)

A. No, merely on a commission. That is the usage that [172] obtains in this business very generally, that these automotive warehouses are set up to supply wholesalers in that vicinity, and they are usually operated independently entirely, and the rental for the space and the service is based entirely on the sales; so much commission on sales.

Q. Do you mean rent for the space and service in the warehouse?

A. Yes, receiving stuff, shipping out, and so on; they handle it on a commission on sales.

Q. These salesmen handle them on a consignment basis? A. Do you mean the warehouse?

Q. Yes. A. We have only a small stock.

Q. How many would you say approximately you have in each warehouse?

A. Approximately I would say we probably carry, from the largest warehouse stock, which is Minneapolis, probably 500 connecting rods to maybe New Orleans, which is a small one, 75 or 100.

Q. Of course, you keep stock at each of these other plants, New York, Chicago, Seattle and Portland?

A. Yes, the necessary stock. Of course, there is quite a variance in the volume of business done in these places, and the stock is usually in proportion to the amount of business done.

Q. Do you have any idea? Is the stock similar?

[173]

(Testimony of J. Leslie Morris.)

A. The stock in Chicago is very similar as to the stock I observed as in Los Angeles. In other places it probably ranges from half that size down to maybe 20 per cent of that size.

Q. How many employees did you employ in your Los Angeles plant during the taxable period?

Mr. Meserve: I will object to that unless he means at any one time. Then I don't know what the materiality of it is.

Mr. Jewell: I will say approximately the average during the taxable period, in the Los Angeles plant?

Mr. Meserve: May I finish?

The Court: I didn't hear what you said, Mr. Meserve, at the end?

Mr. Meserve: I said if it was at any one time, because he could have one man perform the one service and quit every day, and still total his numbers.

Mr. Jewell: I will take an average.

The Witness: Actually working in the shop in Los Angeles here?

By Mr. Jewell:

Q. In your whole unit.

A. That is, both the shop department, office and all?

Q. Yes.

A. It would range right around 20 a day during that [174] period.

(Testimony of J. Leslie Morris.)

Q. Approximately how many of those would be in production?

A. I would say 12 or 14. That would include shipping and receiving.

Q. How about New York? How many approximately do you employ?

A. It employs three people.

Q. Chicago about the same as Los Angeles?

A. Not quite as many. I would say 18. If Los Angeles had 20, Chicago at that time would probably be operating 18.

Q. Seattle? A. Seattle two.

Q. Portland?

A. Three. Correction there; three in the shop at Portland, and the young lady in the office would be four.

Q. In these warehouses which are maintained at various points you consign the rods to the salesmen there for stock?

A. Those small stocks that the salesman carries, yes, they belong to the company.

Q. They are consigned? A. Yes.

Mr. Jewell: If the Court please, I would like to confer with counsel for a moment. [175]

The Court: I will ask a question along that line: How is the transaction affected in Seattle, we will say, if you only had three employees in the shop, or in Portland, I believe you said you had two; suppose a man wants to obtain one of these processed rods, and he has one that is damaged or

(Testimony of J. Leslie Morris.)

injured, what is the method of transaction there?

The Witness: Just the same as here, sir. He comes in. Of course, we carry a much smaller stock, so we babbitt a great many more in proportion to the sales there, but the sales are much smaller.

Q. Let us take Boston, where you said there were warehouse facilities, but no shops. A. Yes.

Q. What is the method there?

A. The rod is exchanged when it is brought to the counter.

Q. What is done with the rod obtained from the customer?

A. It is sent to the nearest branch that is equipped to do the work of babbitting.

Q. There is no way in those places, where there is merely a warehouse facility, to obtain back the identical processed rod that is delivered to the company?

A. Obtain back for the customer, do you mean?

Q. Yes.

A. No, we can't babbitt the rod and give him the [176] same one back. We usually make arrangements, however, with some shop in town to do that work for us, because it is very necessary sort of thing everywhere, and we have arrangements in nearly every city with some machine shop that will do that work for us, for an emergency.

Q. What would be the emergency?

(Testimony of J. Leslie Morris.)

A. A set of connecting rods would come in to be babbitted, let us say undersized, to fit a crank shaft that is ground. They couldn't wait to send them all the way to Chicago or Boston, so we would have to send them out to be babbitted by a machine shop in Boston.

Q. You may or may not have them in stock in the warehouse?

A. We couldn't possibly, because the crank shaft varies so much. They merely clean up the imperfections in the crank shaft, and stop there, so we sometimes have a crank shaft with six different sizes of connecting rods on it.

Q. Approximately what size inventory did you carry in your Los Angeles plant during the taxable period, on an average?

A. I will have to say I don't know. We have the inventory, and I would much rather——

Q. Those books will show then, the audit?

A. Yes.

Mr. Jewell: The number of rods? [177]

The Court: No. Probably it wouldn't show the number but it would show the value.

A. The value, yes.

By Mr. Jewell:

Q. You rebabbitt about 400 rods a day down in your Los Angeles plant? A. Yes.

Q. There was introduced a catalog, 1933, which you stated you sent around to the various supply

(Testimony of J. Leslie Morris.)

houses. Is that your method of advertising,—to distribute the catalog to the various supply houses?

A. Yes, to those who are dealing with us. We don't usually send our catalog promiscuously to everyone, but to those wholesale supply houses who are sending their rods to us for rebabbitting; we keep them supplied with information data.

Q. What methods do you use for expanding your business, Mr. Morris, for getting new customers?

A. Well, in the past we have depended very largely just on the service we have rendered. We haven't employed a salesman, if that is what you mean, for Los Angeles and the Coast plants, and the salesmen who represent these warehouse stocks we have referred to are rather active in their territory in which the warehouse stock is located. It is very frequently a combination of the salesmen, and a place to carry stock. Of course, he is working for a great many [178] other accounts besides ours. He is a combination commission salesman, and probably represents three or four different automotive people with services, and he calls on these wholesale accounts, but at no particular direction from us, because he is independent, on a commission.

Q. Who does the solicitation?

A. We don't use solicitation at all. These folks here I have done business with almost 20 years, and I contact them every once in a while on the phone,

(Testimony of J. Leslie Morris.)

or they contact me. We don't find it necessary. I make a trip occasionally around in the machine, but it is more or less in the nature of a visit.

Q. You don't go out and solicit new customers?

A. No; there have been very few customers who have come into existence in the last few years; among wholesalers, I am speaking of, which, I said represent about 85 per cent of our business.

Q. Is your firm, or are you yourself a member of any manufacturers' association? A. No.

Mr. Meserve: I object to that as immaterial, your Honor. I don't know what purpose that can serve, whether he belongs to an association of manufacturers, or the Chamber of Commerce, or anything else. I can't see that that means anything.

Mr. Jewell: I think the cases have held, your Honor, [179] that the whole manner of general conduct of a corporation, how they do business, and whether or not they hold themselves out as manufacturers, are all material things.

The Court: Overruled.

By Mr. Jewell:

Q. Are you, Mr. Morris—is your corporation, or are you a member of any manufacturers association? A. Any manufacturers association?

Q. Or association of people connected with your same line of business.

The Court: Trade association.

The Witness: Yes, we belong to the L. A. Automotive Trade Association.

(Testimony of J. Leslie Morris.)

By Mr. Jewell:

Q. Any other association?

A. Yes, I think the branch in Portland is affiliated with the Automotive Trade Association.

Q. What type of membership make up the L. A. Automotive Trade Association?

A. Garages, wholesale merchants and suppliers.

Q. In one of these illustrations the legend states that on about half of the rods, in order to prevent the nuts and bolts from becoming tinned, it is necessary to use auxiliary nuts and bolts while the rod is being tinned? A. Yes.

Q. And that the rods and nuts and bolts are removed [180] and thrown into a box and later replaced in the place of the auxiliary nuts and bolts? A. Yes.

Q. When that is done there is no effort to keep the nuts and bolts separated so that they go back into the exact same car or rod, is there?

A. No.

Q. No effort whatsoever?

A. No. They have to go back to Chevrolet rods because they fit Chevrolet rods, but they don't go back into the same Chevrolet rod. I might add that there is no identification mark on the bolt; it would be very difficult to do it anyway.

Mr. Jewell: For the purpose of the record, that is Plaintiff's Exhibit No. 5 to which I refer.

The Court: The same bolts, however, and nuts, however, that are taken off of the appliance and

(Testimony of J. Leslie Morris.)

thrown into the receptable, when the process is finished, or is completed, so far as that particular movement is concerned, are replaced?

The Witness: Yes.

The Court: But they might not get into the same thread or the same hole?

The Witness: That is right. [181]

By Mr. Jewell:

Q. I believe you testified on direct examination many times that garagemen come to your place and leave the rod and come back and pick up the same rod. It is my understanding that you very rarely do business with garagemen; that all your business is with either jobbers or large firms who have truck or auto fleets of their own, and dealers?

A. That is true. Invariably this garageman brings a requisition from the wholesaler. He goes to the wholesaler's place and expresses his wishes, and wants, and they send him over to our place, and he presents a requisition from the wholesaler to perform the work on this rod.

Q. I understand, Mr. Morris, that some of the rods which you rebabbitt need shims, and a certain type of rod comes originally with a shim, and when you rebabbitt it you remove the shim. Do you replace that shim with a new shim?

A. We replace it with a new shim. There are not a great many rods using shims. Shims are ten years or more back, but there are a few rods which

(Testimony of J. Leslie Morris.)

use shims. When that happens, we put the shim in the place of the one we remove.

Q. Who are these people you speak of, from whom you obtain your supply of used rods? Give me the name of a few of them. You said Mr. LaVine?

A. Yes, of used rods; A. L. Klein, Chicago, I think, sell quite a few used rods. Let me see if I can think of another one. Yes, we have a man by the name of Wilson here [182] in the city of Los Angeles; his initials I cannot give you without reference to the book. He brings in some rods occasionally.

Q. Does he have a wrecking business?

A. No, he is a broker, you might say. The rods he knows we will buy are rods that have come out of insurance wrecks because, in other words, it is only a wrecking establishment which handles cars that are wrecked on the streets, late model cars are usually covered by insurance, and he knows what these are, and those we are anxious, for instance, to buy such as some 1940 Chevrolet connecting rods. The reason that he gets that type of rod is because he knows we will pay more for it than a rod back five or six or seven years.

Q. Is Mr. LaVine also a con. rod broker?

A. That's right.

Q. He is located here in the city?

A Here in the city, yes

Q. I show you Plaintiff's Exhibit 43, being bills from Mr. LaVine, and ask you whether or not

(Testimony of J. Leslie Morris.)

these numbers on the left, those three digit numbers are your code numbers.

A. They are our identifying numbers in the catalog, yes.

Q. That is the way his bills are made up to you?

A. The way his bills are made up, yes. [183]

Q. By taking your price sheets, a comparison can be established between the price that you pay for the old rod and what you get for it?

A. That is right.

Q. I believe you testified that the automobile manufacturers also do rebabbitting? A. Yes.

Q. For their dealers? A. Yes.

Q. Do you know whether or not they do rebabbitting for anybody else?

A. No, I do not. I couldn't answer that.

Q. Do you know whether or not, when they rebabbitt a rod which is sent to them, whether or not they treat it as a new rod?

Mr. Meserve: I object to that as calling for a conclusion of the witness, as to what somebody else does with their rods.

Mr. Jewell: I asked him if he knew, if the Court please.

Mr. Meserve: It is still a conclusion; it is immaterial.

The Court: What does that mean, is that treated as a new rod?

Mr. Jewell: Are they sold and boxed—sold at the same price that they sell a new rod? [184]

(Testimony of J. Leslie Morris.)

The Court: You mean separate and apart now from the vehicle that they did sell originally with the rod in it?

Mr. Jewell: Yes.

The Court: A replacement part, do you mean?

Mr. Jewell: That is right.

The Court: Overruled.

Mr. Jewell: Will you read the question?

(The question referred to was read by the reporter, as set forth above.)

The Witness: I would say that most of the car manufacturers keep the division of stock divided very definitely. The rebabbitted rods in their stocks are spoken of and sold as used and rebabbitted rods. You will find many requisitions from us to car dealers which stipulate across the bottom: These must be new factory rods; so that's why I know; we want to get those rather than rebabbitted rods.

Q. Have any dealers ever sent you any rebabbitted rods?

A. Yes, sometimes they have sent some of our own, which we have rebabbitted for them.

Q. That occurred on occasions when you wanted to purchase rods to keep your supply built up to facilitate your exchange service?

A. That's right.

Q. They have shipped you one of your own rods?

A. They have shipped us a great many of them. We have [185] got them back many times.

(Testimony of J. Leslie Morris.)

Q. Sometimes the rod is rebabbitted by you for a Ford or a Chevrolet? A. Yes.

Q. So, so far as a sale to a customer is concerned, they made no distinction between the rod which you rebuilt and the rod which was not?

A. I would say they did, sir; they keep these rods that have not been rebabbitted as new stock in most cases. Now, I am only speaking of my knowledge, that is all; I wouldn't say definitely, but my knowledge is that when you want a new connecting rod from the factory you must ask for that particular thing, and in a great many instances they are not readily obtainable, because they don't carry new stock. There is no occasion for it. A rod does deteriorate, and they constantly babbitt them over; they have for the last ten years or so. Most of the car dealers have their rods rebabbitted locally; they don't attempt to send them back to the factory at all, because they have a lot of freight to take care of.

Q. On those occasions when they send them to you in response to one of your orders, when you were trying to build up your exchange stock by outright purchase of rods from the dealer, when they sent them to you, did they charge you the same price for those rods which they did for others that had not been rebabbitted? [186]

A. That would vary with the manufacturer. I did not know I was going to be asked these questions. I think as a rule the prices are the same.

(Testimony of J. Leslie Morris.)

Q. Whether they rebabbitt or not?

A. As a matter of fact, they sell very few connecting rods. It is always the exchange items. When they exchange a new one for a rebabbitted one, the charge of rebabbitting is just the same. If in a Chevrolet you happen to get a new one you are just lucky. That is all in the exchange process.

Q. I was speaking, and I assume that you were speaking, of an occasion not when you were exchanging a rod with one of the dealers which, of course, you would not do, but an occasion when you had no rod and you needed a rod so that you would have one to deliver to one of your customers, and you went to the dealer and you made a purchase, and he gave you, in response to that purchase order, when there was none turned in on your part, of an old rod—he gave you a rebabbitted rod—at that time did he charge you the same price as he would for a new one?

A. Yes, I think it would be just the same.

Q. I haven't looked through all your catalogs here, and price lists. Do you give any guarantee with your product?

A. Yes, we guarantee the bearing.

Q. What type of guarantee?

A. Against defective workmanship and material. That [187] is a very characteristic guarantee in this industry.

Q. When you go to an automobile dealer to purchase rods, to supply your stock inventory, and

(Testimony of J. Leslie Morris.)

you purchase new rods, or rebabbitted rods, whichever they deliver to you, could you, if you so chose, as part of the price you pay for those rods, give to them a used connecting rod?

A. Do you mean they exchange rods?

Q. Yes.

A. Oh, yes, they exchange rods every day; the car dealers do.

Q. They will exchange them with you as well as with anyone else? A. Oh, yes.

The Court: When you say, "car dealer," do you distinguish dealers in new cars from the others?

The Witness: Yes, I always mean the new car, sir, because that is the only place where there is a reservoir of parts kept. Second-hand dealers do not carry any new parts at all. I am speaking of people like the Howard agency, the Buick agency, and the Chevrolet.

Q. What would be the occasion or necessity for the new car dealer to have a rebabbitted connecting rod?

A. Because the cost of rebabbitting a connecting rod is—I don't know how to get the average, but let us say a Studebaker costs, for rebabbitting a Studebaker connecting rod about one-third of the cost of the whole unit. [188]

Q. I am speaking of the car that comes from the factory to the local salesman, of the new product, what would be the reason for that salesman, seeking an exchange of a connecting rod that is in

(Testimony of J. Leslie Morris.)

the vehicle as it comes to him from the factory—what would be the occasion of exchanging that for rebabbitting?

A. It may have failed in the service. I don't think you are clear on it. The car dealer, in addition to selling new cars, has a parts department, where he has the component unit of every one of his automobiles over the various years. The usual practice in the trade is about three or four years to carry all those component units. He is selling them every day to the garagemen, even to the consumer who wants to install his own frequently, he will sell a man a part of his automobile. So the garageman can go to a car dealer with a broken connecting rod, just as he can go to Chanslor & Lyon, or the Western Auto Supply Company and exchange the connecting rod with the car dealer.

Q. That is limited, however, to the stock of the individual appliance he has in his business; it does not pertain to these used vehicles he sells?

A. No, the vehicle he sells is a unit of itself. The only time one of these connecting rods is exchanged is when there is a failure, and he finds it necessary to replace it.

Q. If one is buying a new car, the presumption is [189] that he buys it new.

A. The connecting rod, and everything that goes with it.

Q. He doesn't buy a revamped connecting rod?

A. No, definitely no.

(Testimony of J. Leslie Morris.)

Q. So he buys what pertains to those in stock, not as part of the car, is that right?

A. As you buy an automobile, it has, of course, all new parts throughout. It is all brand new. Now, you can go to the parts department in that same car dealership from which you bought the new car. The new parts department is not on the sales floor, where they sell new automobiles, but it is a parts department, where they stock connecting rods for that car. A man has a failure of a connecting rod. Let us assume that his automobile was purchased two or three months previous to the time he had the failure of the connecting rod. He can go back to the same dealer from which he purchased his new car, and offer the connecting rod in exchange, and the car dealer will give him an exchange, just the same as the wholesaler, for a single unit.

Q. To replace one that has been damaged or injured or affected in some way which counsel has described?

A. Yes. So the car dealer maintains the same exchange service as the wholesaler does for the garageman.

(Whereupon, at 4:30 o'clock p. m. an adjournment was taken until Wednesday, May 29, 1940, at 10.00 o'clock a. m.) [190]

(Testimony of J. Leslie Morris.)

Los Angeles, California
Wednesday, May 29, 1940
10:00 O'Clock A. M.

J. LESLIE MORRIS

the witness on the stand at the time of adjournment, having been previously duly sworn, was examined, and further testified as follows:

Cross Examination
(Continued)

By Mr. Jewell:

Q. Mr. Morris, do you recall in the building up of your supply bank of rods, when you purchased some of the rods new from people like J. V. Baldwin, and so forth, and purchased some of the rods on which the babbitt had been worn out, do you recall about what percentage you purchased from each of each type, the new and the worn out rods?

A. I would rather refer to the records, but I would say roughly about half.

Q. You testified yesterday that during this particular tax period that you used some methods of aligning rods. Will you describe that method?

A. The different ones? There were several different ones.

Q. You tried several different methods?

A. Yes.

Q. In other words, you were attempting to align [191] rods?

A. Yes, we were attempting to align rods.

Q. What were those methods?

(Testimony of J. Leslie Morris.)

A. We used just the ordinary aligning features which are commonly in use in all garages.

Q. What are they?

A. They consist of a surface plate, we call it, and you place the rod in the middle, and that oscillates the same as a crank shaft in an automobile in which it is going to be installed. The idea is to have the piston side—the side of the piston at right angles to the axis to this member which clamps the connecting rod on. It is a little testing stand, which is commonly used in garages.

Q. In these tests, when it was out of alignment, how did you realign it?

A. In this test, if it is out of alignment, there is a tool that comes with it, with the aligning jigs, and it looks very much like a wrench, and you give it a twist to correct the few thousandths it may be out of alignment; just twist it over beyond the point, and it comes back to the point.

Q. What other method is used?

A. We always used the same method, except to determine if you have gone far enough. It was not very successful, the one where we introduced the switch; we had a light, and when you got it right—it was an apparatus, instead of [192] going in with a feeler gauge and checking it, we would go in with the light. That was not successful, because in the contact with electricity the point burned off, and the rod wouldn't be in perfect alignment. We realized all of a sudden that the garagemen had to

(Testimony of J. Leslie Morris.)

repeat the same operation exactly when he attached the piston to it, so there was no need for us to align them.

Q. I believe you testified on direct examination, when you sold one of your rebabbitted rods to a person or company, who did not have any exchange rods to turn in, that you charged them for the rebabbitting, and also for the shank, but that you took the amount of the purchase money allocable to the payment on the shank, and placed it in a deposit fund; is that or is that not correct?

A. That went in with our general receipt, but we wrote up the invoice to show that the rod was either used, or the word "complete," which meant they were to collect the refund when they brought in the exchange connecting rod. We always do that. As a matter of fact, it is all a charge account. We don't put it into the fund, because 98 per cent of our business is done on open account with the account with whom we deal, so there is actually no fund. We receive the cash. We receive very little cash during the month. Cash comes in in the form of checks and is usually paid around the tenth of the month following the purchase.

Q. In that case, when the payment was made at the end [193] of the month, you take the whole amount and put it in a general sales fund at the end of the month?

A. As a matter of fact, the whole amount wouldn't come in, because we would have issued a

(Testimony of J. Leslie Morris.)

credit against the rods. In most instances, the last few days of the month, the payment you make might be applicable still during the month. Generally we would issue a credit, so the net amount would be the only amount which stood on the books.

Q. When you received payment for the net amount on the books, you put it all in one fund?

A. We put all our receipts in one fund.

The Court: Do you set up a separate fund to take care of the contingencies that might arise on the credit you extend generally?

The Witness: You might say the whole fund takes care of contingencies. We do not receive cash. The cash we receive is usually for rebabbitting we have done for the connecting rod because the customer who has been charged two or three dollars, or whatever the book shows, in addition to the rebabbitting charge, invariably hastens to get those rods right back to you.

The Court: Would the whole transaction be entered as one transaction, or as separate items?

The Witness: No, we always deposit our money to the bank account, and issue a credit.

The Court: I think counsel is trying to get at the [194] segregation of those two features of the deal, the transaction.

The Witness: It is practically all bookkeeping. We charge out for the babbitting, and the deposit, as we call it, to insure the return of similar forgings that we may have in stock, that charge is placed

(Testimony of J. Leslie Morris.)

against the account, and invariably before the end of the month, within two or three days the corresponding forging, exactly alike, corresponding to the connecting rod, will come back to us for credit. In most instances they won't pay the bill unless all the credits due on the returned connecting rod are applied to the payment.

The Court: So far as your accounting is concerned, you set it up as one transaction; you don't segregate your potential refund or credit from the amount of the sale you make?

The Witness: No, we just make a full charge, and refer the invoice number to the customer. That invoice number states a certain amount against the customer, and when we make the credit, we refer back to the invoice number, and credit four or six connecting rods, and return the refund, two or three dollars, or whatever it may be. It is all bookkeeping. It is the net amount on the payment the customer makes at the end of the month, when he cleans it up.

The Court: I don't know whether that clears up what is in your mind. It does in the Court's mind.

[195]

Mr. Jewell: I believe it is clear. I would like to ask this question: In a case where one of your customers doesn't return as many rods as he has received; that is, where he has actually purchased not only the rebabbitting and the shank and everything, and hasn't turned any back, so his net amount at the end of the month includes the price for some

(Testimony of J. Leslie Morris.)

shanks, do you take that net amount and put it into one account? A. Yes.

Q. And you keep no separate deposit?

A. No.

Q. I show you, Mr. Morris, several invoice slips, —four to be exact, which are clipped together, and ask you to identify them.

A. That is the invoice as we render it to the customer.

Q. The invoices reading: "Moroloy Bearing Service," four of them clipped together, I would like to introduce on behalf of the Government.

The Clerk: Government's Exhibit A in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit A.")

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INVOICE

OROLOY BEARING S RVICE

J. LESLIE MORRIS CO., INC.

655 W. 55TH ST. NEW YORK, N. Y.
1361 S. HOPE ST. LOS ANGELES, CALIF.
2714-16 S. STATE ST. CHICAGO, ILL.
1934 BROAD ST. REGINA, SASK.
10 S. DAVIS ST. JACKSONVILLE, FLA.
310 N. LAUREL ST. RICHMOND, VA.
1520 TENTH AVE. SEATTLE, WASH.
296 IVY ST., N. E. ATLANTA, GA.
606 SANTA FE DRIVE DENVER, COLO.
2354-56 VALLEY ST OAKLAND, CALIF.
162 N. FOURTH ST. COLUMBUS, OHIO
221 N.W. TENTH AVE. PORTLAND, ORE.
1516 THIRTEENTH AVE. W. VANCOUVER, B. C.

Branch _____ Date 11/21/[illegible]

Sold to [illegible]

Address [illegible]

Ship to _____ Via _____ Customer's Order No. [illegible]

QUANTITY	STOCK NO.	DESCRIPTION	REBAB.	EXTENSION	FORGING	EXTENSION	TOTAL
1	[illegible]	[illegible]		45			
1	[illegible]			55			
2	[illegible]		45	90			
2	422		70	140			
				330			3,30

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
MAR 27 1941
PAUL P. O'BRIEN,
CLERK

No. 4333-M Civ
Morris Co.
vs.
NLRA
U.S. EXHIBIT
No. A
Filed 5/29/1940
R. S. ZIMMERMAN, Clerk
By [illegible]
Deputy Clerk

ENTERED

THIS IS YOUR INVOICE. WE DO NOT ITEMIZE AGAIN

No. 120233

No goods will be accepted for credit unless returned with our permission. Transportation charges must be paid and date of invoice accompany goods. A 10% charge to cover handling will be made on all returned goods unless returned on account of being defective or error on our part. Goods made to order are unreturnable. No claims allowed after 15 days from date of invoice.

27428 NEBRASKA SALESBOOK CO., LINCOLN-CHICAGO 400 N. MICH. AVE. PHONE 3844

(Testimony of J. Leslie Morris.)

The Court: These items on the invoices, Exhibit A, Mr. Morris, I observe on two of them there are items: "Extension" only, and on the others, "Rebab." What is the difference between those two transactions? For instance, [196] the last one has under "description," "Complete."

A. "Rebab" indicates the article. "Extension" means that the rods were received by us to be rebabbitted. We rebabbitted them and returned the rods to the customer. That was the only transaction. Now this is complete.

The Court: That is the last one?

The Witness: That is the last one. We have listed the same parts exactly as we would have charged had the rods come in before the rebab. He gave us a deposit, because the rods did not come in. We segregated it that way, and so the customer can readily check his credit memorandum when he gets them back later on. This rod will come in; presumably 98 per cent do. This rod will come in for credit. We refer to the invoice number so-and-so, and say, "Crediting your account $1.80." This indicates that the connecting rod went out of our stock without exchange. This indicates the rod was handed to us to be rebabbitted.

The Court: What is the difference under the description "Complete"?

The Witness: "Complete" means the connecting rod and the labor operation we have done on it. We have some accounts we loan rods to and so state,

(Testimony of J. Leslie Morris.)

"Rods loaned." But that is the only point. Is that clear?

The Court: Yes.

By Mr. Jewell:

Q. Yesterday, Mr. Morris, I believe you testified [197] concerning certain other plants which you have in various cities in the United States, and I notice here on the top of the invoice, Defendant's Exhibit A, that there are several places listed which you did not mention yesterday; more specifically, Denver, Colorado.

A. An affiliated one, that we never owned.

Q. Vancouver, B. C.

A. Another of the same sort.

Q. Saskatchewan?

A. No, we never owned that at all.

Q. Regina, Saskatchewan?

A. Affiliated only. They pay no royalties at all. The others have paid royalties. I think one plant paid us a royalty—that is, similar to a royalty. They paid for the plant one per cent on what they did; in other words, the terms of it were based on the percentage of what they did. That was the one in Denver; but the only affiliation was, we sold them the mold, and stuff like that, to cast bearings, way back in the '20's.

Q. Did you build any of the plants in Denver?

A. No; we furnished some of the stuff, like molds, and things like that. That was in '27, I think.

Q. Did you build any of the other plants?

(Testimony of J. Leslie Morris.)

A. Of the affiliated plants?

Q. Yes.

A. No, we didn't build them and sell them, if that [198] is what you mean. We just sold them certain tools.

Q. After you sold them certain tools, what were your business relations with them which justified their name being on your invoices?

A. They bought tools from us. It was rather an inducement to get them to buy our tools. We were trying to build, with a small capital, what would look like a national service. That was the purpose of it, and why we adopted the word "Moroloy," meaning "Morris" and "alloy." That was the purpose of it.

Q. Did you sell them any rods?

A. No rods.

Q. Their names then were merely on these invoices because of the fact that they were using the method you had designed?

A. Yes, and they were using the word "Moroloy" which had probably some national value; and they were using it.

The Court: You spoke about a royalty. I didn't quite understand what you mean.

The Witness: In the sale of the Denver plant—I guess I shouldn't have mentioned it—the deal at the Denver plant was that the young man from Los Angeles had very little funds, and rather than having a definite amount each month, he agreed to pay

(Testimony of J. Leslie Morris.)

a percentage on what he did until the amount of the sale was complete. We kind of called that a royalty for a while. There was one plant, the Oakland plant, which [199] we sold earlier, which pays us definitely a royalty of two per cent on their rebabbitting each month. Those are the two. The Denver plant has long since paid out, and pays us no more. During this period, however, the only period we are speaking of, the only plant from which we were collecting royalty was the Denver plant. We were not collecting any royalty from the Oakland plant at that time.

The Court: At the time with which we are concerned here, was this process patented?

The Witness: No, sir.

The Court: Or was the method patented?

The Witness: No, sir. We used common tools, the same as anyone else uses for the same purpose. There are three or four concerns in town that use the same type of tools.

Q. This compound word "Moroloy," was there a patent on that product?

A. The name was copyrighted, sir.

Q. But the process you utilized in servicing was not a patented process?

A. No, sir, and the name, I might say, was originated around '20 or '21, when we had no thought of babbitting connecting rods at all. We were making an entirely different article, a little detachable bearing that was detached from the connecting rod;

(Testimony of J. Leslie Morris.)

in fact, that was the usage at that time among car dealers. We started babbitting connecting rods about '22 or '23, as I recall it. [200]

By Mr. Jewell:

Q. Do you know, Mr. Morris, in setting up your inventory, what price you evaluated the stock at, which you have on hand?

A. Roughly, I know.

Q. Was it at the price at which you sold wholesalers?

A. No, we discounted that, of course. Very few people carry inventory at the selling price. It is usually the cost.

Q. At what price do you carry yours, do you know?

A. I couldn't answer that. I would have to ask our accountant to help me out.

Q. Are you familiar, Mr. Morris, with the methods of doing business of various rebabbitters?

A. More or less, yes.

Q. Would you say that rebabbitters, whose business you are familiar with, handle their sales and exchanges more or less in the same manner?

Mr. Meserve: I object to that, your Honor, as incompetent and immaterial; not proper cross examination, and of no evidentiary weight in this case.

The Court: Well, it may be. There are some features of the business under scrutiny here that are unique, I think, and in fact, matters we have a right

(Testimony of J. Leslie Morris.)

to make comparison of relative to other activities that are similarly engaged in the business. It is no conclusion, of course. The problem [201] here is to determine whether this is a manufacturer or something else, but analogies are helpful in tax matters, because there is supposed to be uniformity of levy. The theory of the tax laws is to bring about uniformity; every citizen must be treated the same with reference to the same character of activity. Overruled. Read the question.

(The question referred to was read by the reporter, as follows:

"Q. Would you say that rebabbitters, whose business you are familiar with, handle their sales and exchanges more or less in the same manner?")

The Witness: Yes.

By Mr. Jewell:

Q. In other words, most rebabbitters will take in the old in exchange?

A. Yes. We were all drawn very closely together during the N. R. A. days, and virtually the method of procedure which Baudet used in San Francisco was the same as mine; same as Hempe-Cooper, in Kansas City; Conrad Exchange; Seattle Exchange; there were some shops, of course, which did not come into the N. R. A., and I wouldn't presume to state what their methods were; but we got a very good insight into each other's business at that time.

Q. With respect to the particular method of

(Testimony of J. Leslie Morris.)

handling customers, most rebabbitters did that in the same way?

A. Yes. The Federal Mogul, one of the largest in [202] the United States, they handled them in exactly the same way we did.

Q. These automobile manufacturers, when they did rebabbitting, as I believe you testified, they also handled their rebabbitting on an exchange basis?

A. Yes.

Q. I believe you testified a moment ago, in response to a question from the Court, that about 98 per cent of the time the customer returned an old rod. Not to be quibbling, but merely to determine if there is some other element which has not been directed to your attention, you also testified that about five per cent of the rods which you sold per month were ones which you had to purchase.

A. I think I said "about" in each instance.

Q. Ordinarily those two——

A. They should very nearly tally. I left a gap there of about two per cent.

Q. Mr. Morris, would you tell us what babbitt consists of—the type of babbitt that you use?

A. The kind of babbitt we use consists of from 88 to 90 per cent tin, and the other two component parts, copper and antimony, in varying proportions; from 88 to 90 per cent tin, and the two other component parts, being the copper and antimony, varying; in other words, 88 per cent of tin would have

(Testimony of J. Leslie Morris.)

about six per cent of copper; 90 per cent of tin about three and a half per cent of copper, and the balance, antimony. [203]

The Court: But in all babbitt there are those three elements?

The Witness: In all the babbitt we use.

The Court: That was not my question.

The Witness: Babbitt is a very much abused word. They call anything babbitt from 95 per cent lead to 5 per cent antimony. There are different uses for the cheaper babbitt. Some may be composed of lead, antimony, tin and copper. There are four kinds of babbitt metals.

By Mr. Jewell:

Q. During the taxable period here involved, how much did the babbit that you used cost you per pound, delivered; the approximate price during that period? A. Can I answer generally?

Q. Yes.

A. Babbitt—our babbitt, which, of course, was 90 per cent tin, is affected entirely by the tin market. We consider it low in price when it is below 40; high in price when it is above 60 cents a pound. There is a range of fluctuation every day. We had to give during this period—that is, the bottom price, around 45 or 40, and the top price of 65 or 60. That is due to the daily fluctuation of the tin market.

Q. How many pounds of babbit would you say you averaged per month during this taxable period, in your purchases? [204]

(Testimony of J. Leslie Morris.)

A. I am afraid that would be more of a guess. You will have that on the statement of raw materials. I think we have a statement of operations that will show the cost of the materials. That is much better than I can tell you, unless you wish me to give an opinion.

Q. Your raw materials will also include bushings? A. Yes.

Q. From whom do you purchase those bushings?

A. For many years from Bunting Brass and Bronze, Toledo, Ohio.

Q. All the bushings? A. Yes.

Q. From whom do you purchase shims?

A. From the National Motor Bearing Company, Oakland, California.

Q. Approximately what do you pay for bushings?

A. Bushings will range in price from three cents to fifty cents each, depending upon the amount of brass in them, the diameter, and so on. Some might be even higher than fifty cents.

Q. How about shims?

A. Shims would almost cover the same thing; two or three cents.

Q. You have testified that you used the old babbitt which comes off of the rods which are brought in to you. Will you tell me approximately what per centage of that old [205] babbitt you use as compared with new babbitt which you purchase? Can you give an opinion on that?

(Testimony of J. Leslie Morris.)

A. Oh, I would say that to replace what is removed when the rods come in to us—because the babbitt is exactly the same; the analysis of the old babbitt will be exactly the same as the analysis of the new babbitt; approximately the same—so much so that we mix the two together and go right ahead and use it—I would roughly say possibly half.

Q. So on most of the bearing rods that come in to you about half the babbitt——

A. Still remains in it, yes. Then too, you must remember that babbitt, from melting it over and over, oxidation takes place, and when you scrape off the top we lose in weight about five per cent, to melt the babbitt off—you skim about that much off the top.

Q. When the average rod is brought in to you nearly half the babbitt is burned off or worn away?

A. About, I would say. I wouldn't want to be kept right to the point.

Q. Mr. Morris, I show you a document entitled "Articles of Incorporation of J. Leslie Morris Co., Inc.," and ask you if that is a true copy. That is a copy that came from your files?

A. Yes, that's right. That is a true copy.

Mr. Jewell: I would like to introduce this into evidence on behalf of the Government. [206]

Mr. Meserve: I am going to object to it, your Honor, upon the ground it is incompetent, irrelevant, and immaterial. It can't serve any purpose in

(Testimony of J. Leslie Morris.)

this case. I anticipate the argument is made that the corporation's articles may indicate what it is authorized to do, by its charter, but as we know, and I think the Court takes judicial notice, many corporations are authorized to do many things that they never enter into or upon, and I think the fact that they may be incorporated to do a manufacturing enterprise would not serve to prove that they did it, if that is the purpose for which it is being introduced.

The Court: It might serve to prove it; it wouldn't prove it, if that is what you mean. It would be an item in the scheme of proof looking to that conclusion. If a man says he is engaged in the manufacturing business, it is some evidence against him, that he is so engaged; it is not conclusive, of course. Let me read it before ruling. Objection overruled.

The Clerk: Government's Exhibit B in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit B.")

RESPONDENT'S EXHIBIT B

ARTICLES OF INCORPORATION

OF

J. LESLIE MORRIS CO., INC.

Know All Men by These Presents: That we, the undersigned, all of whom are citizens and residents

(Testimony of J. Leslie Morris.)

of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California.

We Hereby Certify:

First: That the name of said corporation shall be J. Leslie Morris Co., Inc.

Second: That the purposes for which it is formed are as follows:

To own, maintain and operate a business for the manufacture, sale and distribution of Automotive and Industrial Bearing Metals and products.

To own, maintain and operate branch plants and offices in the State of California and elsewhere for the manufacture, sale and distribution of such metals and products.

To acquire land, buildings and personal property in the State of California and elsewhere for the purposes of establishing, maintaining and operating such plants and offices as may be necessary for the manufacture, sale and distribution of such metals and products.

To acquire, by purchase, lease, or assignment, patents and patent rights bearing on the manufacture of such metals and products.

To acquire, by purchase, lease, or assignment, plants or businesses of other persons, firms or corporations for the further development of the business of this corporation, and to acquire and hold shares of stock and bonds of other corporations,

(Testimony of J. Leslie Morris.)

and to sell, exchange and otherwise dispose of or trade in such shares and bonds.

To do any and all things necessary to properly carry on the business of the corporation, and to do any and all things necessary or incident to the carrying on of the various lines of business in which this corporation may now or hereafter be engaged.

* * * * * * *

[Endorsed]: Respondent's Exhibit B. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy.

Mr. Jewell: If the Court please, I would like to confer with counsel.

Q. Mr. Morris, I show you what purports to be a copy of the 1933 return of capital stock tax for the J. Leslie Morris Corporation, and ask you if you identify that as a [207] true copy of the return, or is that the one which you furnished the Government out of your file?

A. You will have to ask our accountant to pass on that. I don't recall of having seen it before.

Mr. Meserve: We will make no point of the fact that it is not a copy of the original.

Mr. Jewell: Thank you. Then I would like to offer this in evidence on behalf of the Government as Defendant's Exhibit C.

The Clerk: C.

(Testimony of J. Leslie Morris.)

Mr. Meserve: We will object to it upon the ground it is incompetent, irrelevant, and immaterial.

Mr. Jewell: It is offered for the same purpose, as were the articles of incorporation.

The Court: Objection overruled.

The Clerk: Government's Exhibit C in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit C.")

RESPONDENT'S EXHIBIT C

1933 RETURN
OF
CAPITAL STOCK TAX

For Year Ending June 30, 1933
Domestic Corporations

This return must be filed with the Collector of Internal Revenue for your district on or before July 31, 1933, and the tax must be paid on or before that date.

1. Name—J. Leslie Morris Co., Inc.

2. Address—1361 So. Hope St., Los Angeles, Calif.

3. Name of parent company, if any— (District filed—)

4. Name of subsidiary, if any— No. shares held— (District filed—)

5. Nature of business in detail—Manufacture Motor Bearings.

(Testimony of J. Leslie Morris.)

6. Incorporated or organized in State of—California. Month—October. Year—1925.

* * * * * * *

[Endorsed]: Respondent's Exhibit C. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Jewell: I wish to confer with counsel again, please. With the consent of counsel, and no objection to the fact that these are not the originals, I offer a copy of the State of California Bank and Corporation Franchise Tax Return, of J. Leslie Morris Co., Inc., for the calendar year 1932, as Defendant's Exhibit D.

The Clerk: Government's Exhibit D.

Mr. Meserve: We are objecting to it upon the ground [208] that it is incompetent, irrelevant, and immaterial, but not incompetent because it is not the best evidence.

Mr. Jewell: It is introduced for the same purpose as the articles and capital stock tax return. We are offering it merely for the purpose, your Honor, as an answer to Question 5 at the top of the return, as to the kind of business, where it is stated, "Mfg. Motor Bearings."

The Court: Ojection overruled.

The Clerk: Government's Exhibit D in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit D.")

(Testimony of J. Leslie Morris.)

RESPONDENT'S EXHIBIT D

State of California

BANK AND CORPORATION FRANCHISE TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days after the close of taxable year, together with remittance payable to State Treasurer.

[Space for Name and Address.]

1. Exact corporate title, J. Leslie Morris Co., Inc.
2. Mail address, 1361 So. Hope Street, Los Angeles, Calif.
3. Date of incorporation, Oct. 14, 1925.
4. Under laws of California.
5. Kind of business, Mfg. Motor Bearings.
6. Date began business in California, Oct. 14, 1925.
7. Is this a consolidated return? No.
8. Consolidated with. .....

Copy Statement of Net Income From Corporation Federal Income Tax Return for the Calendar Year 1932, or the Fiscal Year Commencing.....and Ending.....

Gross Income

* * * * * * * *

[Endorsed]: Respondent's Exhibit D. Filed 5/29/1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

Mr. Jewell: I offer the same return for the calendar year 1933, for the same purpose.

Mr. Meserve: Same objection.

The Court: Same ruling.

Mr. Meserve: With the same understanding, that I am not objecting to their being incompetent by reason of their not being the best evidence.

The Clerk: Government's Exhibit E.

(The document referred to was received in evidence and marked "Government's Exhibit E.")

RESPONDENT'S EXHIBIT E

State of California

BANK AND CORPORATION FRANCHISE TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days after the close of taxable year, together with remittance payable to State Treasurer.

[Space for Name and Address.]

1. Exact corporate title, J. Leslie Morris Co., Inc. Corporate number, 116056.
2. Mail address, 1361 So. Hope St., Los Angeles, Calif.
3. Date of incorporation, Oct. 14, 1925.
4. Under laws of California.
5. Kind of business, Mfg. Motor Bearings.

(Testimony of J. Leslie Morris.)

6. Date began business in California, Oct. 14, 1925.

7. Is this a consolidated return? No.

8. Consolidated with. .....

Copy of Statement of Net Income From Corporation Federal Income Tax Return for the Calendar Year 1933, or the Fiscal Year Commencing.....and Ending.....

Gross Income

* * * * * * * *

[Endorsed]: Respondent's Exhibit E. Filed 5/29/1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Jewell: I also offer in evidence a copy of the same return for the calendar year 1934, for the same purpose.

Mr. Meserve: Same objection.

The Court: Same ruling.

The Clerk: Government's Exhibit F in evidence.

[209]

(The document referred to was received in evidence and marked "Government's Exhibit F.")

RESPONDENT'S EXHIBIT F

State of California

BANK AND CORPORATION FRANCHISE TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days

(Testimony of J. Leslie Morris.)

after the close of income year, together with remittance payable to State Treasurer.

[Space for Name and Address.]

1. Exact corporate title, J. Leslie Morris Co., Inc.
2. Mail Address, 1361 S. Hope St., Los Angeles, Calif.
3. Date of incorporation, Oct. 14, 1925.
4. Under laws of California.
5. Date began business in California, Oct. 14, 1925.
6. Kind of business, Mfg. Motor Bearings.

Copy Items 1 to 27 From Page 2, Corporation Federal Income Tax Return for the Calendar Year 1934 or theFiscal Year Commencing..... and Ending.....

Gross Income

* * * * * * * *

[Endorsed]: Respondent's Exhibit F. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

By Mr. Jewell:

Q. Mr. Morris, to reiterate the figures, I believe you testified that approximately ten per cent of the rods which you sold went back to the same person; the same rods went back to the same person who turned them in. That percentage figure is correct? A. Roughly, yes.

(Testimony of J. Leslie Morris.)

Q. To the best of your knowledge?

A. To the best of my knowledge, yes.

Q. You stated, in response to a question from counsel for the plaintiff, that when rods were injured or damaged, you did not take them in. Will you explain to us what you meant by injured or damaged?

A. We mean that when the connecting rod is, in our opinion, unfit for further service.

Q. What would make it unfit for further service?

A. A crack in the surface of the rod which, although it was not broken, that crack is there, and we would be fearful of putting it in automobiles—so fearful that we return it. If it is badly bent, or bent at all, for that matter, so it is easily noticeable to the eye, straightening might jeopardize its safety for further use.

Q. But during the taxable period here involved you did straighten them? [210]

A. Aligning, yes. Aligning is a little bit different from straightening. Straightening is when the rod obviously is bent or cracked. Aligning is to correct a slight adjustment of three-thousandths to five-thousandths of an inch. On the shaft it has twisted to that extent and that is designated as aligning.

Q. In other words, straightening a rod is correcting a longitudinal curvature?

A. Yes. Sometimes they come in bent double and nobody would attempt to straighten a rod of that sort.

(Testimony of J. Leslie Morris.)

Q. Aligning a rod is where you adjust the cap or the shank end of the rod?

A. No, it is still a bending operation, but such a slight bending operation; it is still a straightening operation, I mean. We still straighten the bend that is in the rod, but that is so small, one-thousandth or two-thousandths of an inch, that it could not possibly affect the structure of the steel and imperil its ability to function further.

Q. Mr. Morris, it is not clear to me just exactly what the difference is between straightening and aligning. For the purpose of the record, at least, I am sure it is not quite clear, and I would like to have you explain the difference, if you can.

A. I am speaking in the parlance of the trade; in the parlance of the trade we call straightening a rod when [211] you would possibly stick it into a vise on the bench, with no thought of alignment at all, but probably trying to correct it with the eye, to look straight. That is what we call straightening a connecting rod. Aligning is something you cannot possibly determine with the eye. You must mount it on a fixture, which is a common fixture in all garages, and by a surface plate, determined by a feeler gauge. A feeler gauge is a thin sheet of steel, with designations of a thousandth or two-thousandths, usually grouped together like a fan, so that you can select one-thousandth or two-thousandths, or three-thousandths. It is determining a very, very fine adjustment in the perfect alignment of the connect-

(Testimony of J. Leslie Morris.)

ing rod bearing with the wrist pin, and invariably now it is done when it is assembled. Aligning is a very fine adjustment whereas straightening is just hitting with a hammer and pulling to make it straight to the eye.

Q. After straightening you would further refine the straightening by aligning?

A. Yes, we do not do straightening, because we do not want to take the responsibility.

Q. What you mean is, alignment, in common parlance, is a fine degree of straightening?

A. Yes.

The Court: A degree of straightening?

The Witness: Yes; it requires instruments to deter- [212] mine how much it is out.

The Court: Instruments of precision?

The Witness: Yes.

The Court: You did aligning during the taxable period?

The Witness: Yes, we frequently have rods brought to the counter, and they say, "Please align them for us." We align them and hand them back the same connecting rod. That is a practice that obtains in the industry.

By Mr. Jewell:

Q. That is your custom?

A. Yes, because some garages do not have this equipment, some of the very smaller ones, and they send them to us to have the rods aligned. That is common practice in the trade, to have one of these

(Testimony of J. Leslie Morris.)

stands for aligning, but it is a very expensive tool. Most of the garages are provided with them, but some few are not.

The Court: Have you finished that line?

The Witness: Yes.

The Court: I want to ask you a question about this prospectus. I am calling the catalog a prospectus, referring to Plaintiff's Exhibit 49, which is the one marked 1933. I call your attention to the following language appearing on the inner side of the first page: "Features of 1933. Jobber's Inventories Reduced. Rights and Lefts now Interchange. Jobbers Need No Longer Stock both Rights and Lefts to Service Off-set. Pressure Feed Connecting Rods. [213] By our exclusive manufacturing practice, developed for 1933 conditions—Jobbers now reduce inventories 50% on these numbers. Obsolescence protection and stock control. Again 1933 conditions demand protection of jobbers' investments. Moroloy has met the situation with an Obsolescence and Stock Control Plan, which guarantees complete and continuous protection of the Jobbers Connecting Rod Investment. Details on request."

On the next page the following: "Casting. Moroloy Certifugally Processed Rods Meet Engineering Specifications of Original Car and Motor Manufacturers. This process deposits babbit on the tinned surface under extreme centrifugal pressure, assuring an absolute bond between babbitt and steel, that

(Testimony of J. Leslie Morris.)

is not obtainable by the old fashioned hand poured method. Centrifugally processed connecting rods are endorsed by the Society of Automotive Engineers and are used exclusively by the following manufacturers:"—mentioning a number of them.

Then this legend: "If it's not centrifugally cast —it's not a factory duplicate."

Under the heading: "Machining and Finishing: Moroloy machining and finishing is accompanied with the same engineering exactness, following closely the recommendations and usages of leading original manufacturers. * * * Moroloy processed rods are straightened, cleaned and serviced with new bolts, nuts, shims and piston pin bushings. Oil [214] clearance allowed. No scraping nor reaming required. Electrical alignment is an exclusive Moroloy feature."

A. Under the whip of extreme competition that was sales talk. We thought we had hit on something which was very good when we put the electric light on the aligning fixture. We found it was a failure and used it no more. I can explain the obsolescence feature.

The Court: After I finish it all I will ask you.

"Service. Fifteen manufacturing plants, located at strategic points over the United States and Canada, render a coast-to-coast service, convenient to every jobbing center. Ample stocks at all branches assure same day shipment. Telephone and telegraphic orders receive instant attention." Now you may make any explanation you deem pertinent.

(Testimony of J. Leslie Morris.)

The Witness: In 1933, your Honor, the conditions were not any too good. Everybody was fearful of their investment. We thought we had hit upon a very wonderful scheme when this catalog was brought out, to save, if possible, the number of connecting rods that the wholesaler kept on his shelf. There is what we term a bleeder hole on the side which sprays the oil. We refer to it in the legend under the picture. That sprays the oil on the cylinder wall. Now, the new rods,—in fact, all the connecting rods, the ones that are in the original car, are all set around in one way so that the oil hole extends, say, on the [215] right-hand side of the motor, and flows oil to spray on the cylinder wall of the right-hand side. There is no hole on the other side as they originally come to us. There was no reason why you couldn't reverse the connecting rod. So in referring to obsolescence we meant that we drilled the hole the same size on the opposite side so that you could put the rod in, despite the fact that it was a trifle off-set, and instruct that the garageman plug the hole he did not use. In other words, we drilled a hole on each side. We found that was not practical, because the garageman very shortly would put it in without reading any instructions at all, and would leave both holes open so it would burn out, and it wouldn't give the oil pressure; so that was one of the things in 1932 to 1933 we were all struggling very hard to do, without en-

(Testimony of J. Leslie Morris.)

tailing any more investment than was necessary.

By Mr. Jewell:

Q. Will you explain which end of the rod the bleeder hole is in? A. The babbitting.

Q. In the upper end?

A. In the upper end, yes. Do you want that explained as to the fifteen manufacturing plants?

The Court: If you want to explain that.

The Witness: Yes, I would be very glad to do it, because Moroloy service is rendered in places other than [216] rebabbitting establishments. For instance, in Regina, Saskatchewan, when you walk up to their business, you find it is a machine works. They are rendering Moroloy service. You find a regular manufacturing plant. I think they manufacture instruments. They bought the equipment, and have added the business of manufacturing connecting rods. Frankly, we did not know it was such an important word at the time. In other places, take for instance, Atlanta, Georgia, their Moroloy bearing service is a part of a wholesale automotive establishment. In Jacksonville, Florida, that is a machine shop where they do crank shaft regrinding, engine boring, and so they use the word "Moroloy" to distinguish that service rather than the machinery. It is a place where repairs were generally done, and in some instances, manufacturing was done. Of course, in our own plants, we do nothing but babbitt connecting rods.

The Court: What is it that produces or enables

(Testimony of J. Leslie Morris.)

one to practice this Moroloy system, so called? Is it tools?

The Witness: Yes, they bought molds from us. We had a whole string of little molds and patterns to have cast iron molds made from which we could sell cheaper than they could produce the patterns, and have each made individually. As I recall it, we sold the outfit for $2900.00. That was the whole string of molds, to compensate for the various types of oil patterns we used. This was started back in '25 when practices were a little bit different. As a matter [217] of fact, all that we sold are no longer used by virtue of the conditions in the automobile industry. We had those patterns made, and from those patterns cast iron molds were made that they would pour the babbitt against, in every instance following, just as the book says, the design and practice of the original car manufacturer. In other words, we wanted to put babbitt in our babbitted rod to conform to their recommendations, because we felt the engineers knew what they were doing. That was the analogy that we were trying to accomplish all the time; that our repair job would be just as serviceable to the customer as it was originally.

The Court: Was that the only commercial advantage? For instance, in Saskatchewan, Canada, where labor conditions would be different—assuming they would be different, was that the only commercial advantage that a man desiring to engage

(Testimony of J. Leslie Morris.)

in this business would have in using your system, the Moroloy system, would be the mechanism whereby he practiced this system?

The Witness: Yes, it was more or less the thought of getting us all under the same trademark name; under the name we copyrighted; the same name, so that it would give a semblance of national organization, national service, we might say; not to hold out as a national organization or a national service.

The Court: I am speaking of Saskatchewan, the international service. [218]

The Witness: That is the only place we cross any boundary, however.

The Court: Was there something in the system that indicated an efficient babbitting of a connecting rod that had been used and was not unfit for use, but imperiled the efficient use of the vehicle—wasn't the system designed to change the connecting rod so that it would function just as efficiently as it did when it came from the factory?

The Witness: That is exactly right; so it would function just as efficiently as the rod had originally with the bearing in it; in other words, our rebabbitting service followed the line of a new connecting rod at the factory, that would be babbitted the same as ours. They are made of steel, and have to be babbitted. That is what is called original babbitting. That is why we referred to using the same process in our rebabbitting as they did on the original rod

(Testimony of J. Leslie Morris.)

to babbitt it. That was the point we were trying to get across; trying, naturally, to make it appear that we did it better than anyone else, and which was natural in business advertising.

The Court: You say, quoting again from the same Exhibit 49: "Moroloy machining and finishing is accomplished with the same engineering exactness, following closely the recommendations and usages of leading original manufacturers." What did you mean by saying "original manufacturers"?

The Witness: The people I mentioned yesterday. When [219] you drive an automobile off the floor, we would say that everything in that automobile was original; that is to say, the babbitting is original, the wrist pins are original, and so on. As you see 500 or 5,000 more down the road, some parts of the automobile would fail; in this instance, the babbitt, for want of oil, or excessive use, or failure of the operator to put oil in, and this bearing is impaired; that is, it begins to make a noise; you hear a clicking; it begins to make a noise, and it indicates that it should be replaced. It doesn't stop the automobile, but it does mean that it should be replaced so at the first opportunity, when you have a valve ground, or something like that, the garageman invariably finds it and suggests to you while he is in the automobile, repairing it, "Hadn't you better get this rod exchanged." It is common parlance of the industry. That is a distinguishing feature. When we say "original," we mean a new

(Testimony of J. Leslie Morris.)

automobile as delivered to the customer. Later on, when some part fails, just exactly as a tire is replaced, or something of that sort, so it is with a connecting rod. The rod is all right, but the bearing needs rebabbitting, and as the garageman frequently says, "Go over and get the rod exchanged for this," or "This bearing is cracked," and "we have an extra for it." I hope I have made myself clear.

By Mr. Jewell:

Q. I show you Plaintiff's Exhibit 46, a price list [220] effective April 15, 1933. When was your next price list after this one?

A. From memory, sir, I couldn't say, but we have got them all here. We went through the files and picked them out very carefully. We only had one or two, but the ones we have, to the best of my knowledge, are the ones in sequence as they came out.

The Court: Here is one effective September 24, 1934: Exhibit 47.

The Witness: The dates on them indicate the sequence in which they were issued.

The Court: This Plaintiff's Exhibit 47, being a price list effective September 24, 1934, is the last of the price lists which are placed in evidence, to the best of your knowledge, that covers up through the taxable period here involved?

The Witness: Yes.

Q. Mr. Morris, I see on Exhibit No. 21, in the legend, you have stated that the rod is now placed

(Testimony of J. Leslie Morris.)

in the lathe and babbitt is bored, faced and chamfered. Explain the meaning of that word.

A. Chamfered?

Q. Yes.

A. It is the little oval edge on the side we faced perpendicularly. If we bore a hole, we have square corners, and we knock off the square corners, and the oval, the rounded [221] effect is called chamfering.

Q. Similar to beveling?

A. Yes. It is oval, rather than flat. They are frequently just beveled though. In this instance we do the same operation.

Q. You state on the legend of Picture 26 that about one-half the connecting rod rebabbitts require new bushings in the small end of the shank. What happens to the other end of the rods?

A. They are so designed that they clamp the wrist pin tight with a screw. I can show you the distinction. There is a clamp, and that doesn't require a bushing, because when the clamp screw is put down, it pulls down tight on the wrist pin that is loose in the piston.

Q. Referring to what exhibit?

A. Exhibit 41. It is just the design of the connecting rod. It doesn't take a bushing. That shows plainly, because that has a new bushing in it.

Q. Plaintiff's Exhibit 34?

A. Yes. Those are the two types. They run just about equal, I would say.

(Testimony of J. Leslie Morris.)

Q. I notice on Plaintiff's Exhibit 34, in the bushing in the shank end of the rod, the small bushing, a groove around the center of the bushing. Is that made by you, that groove?

A. No, the groove is in the bushing when we buy it. [222]

The Court: Let me see that exhibit. You buy the bushing?

The Witness: Yes, we buy the bushing.

The Court: Do you babbitt it?

The Witness: We buy the bushing from the Bunting Brass at Toledo, and there are several other manufacturers of bushings.

By Mr. Jewell:

Q. Mr. Morris, on Plaintiff's Exhibit No. 29 you state in the legend that certain Pontiac Bearings require a continuous oil groove around the center. What other model automobiles also require that?

A. The very late 1939 and 1940 Chevrolet. I believe those are about the only two,—the Chevrolet, and the Pontiac; but I believe that we cut the same oil groove in the '40 Chevrolet.

Q. I notice that Plaintiff's Exhibit 32, in the legend, it ends the statement with respect to the procedure involved in the plaintiff corporation. What occurs to the rods after this operation is completed, as described in Plaintiff's Exhibit No. 32?

A. What happens to the connecting rod?

Q. Yes.

(Testimony of J. Leslie Morris.)

A. It is packed and shipped; put in boxes and shipped. We unfasten the nut to see that the thread in the bolt has not slipped during the time it was tightened [223] up while we were rebabbitting it. We check it, and then it goes in the little red box we spoke of, and is sent back to the customer. In many instances they are waiting at the counter for them, and we don't put them in the box.

Q. When a con. rod comes in to you, and it is of the type shown in Plaintiff's Exhibit No. 34, it requires that small bushing at the shank end of the rod, you automatically remove that bushing, do you not? A. The old bushing?

Q. Yes. A. Yes, we take it out.

Q. Whether it is damaged or is not?

A. The supposition is it is worn or it wouldn't come in. We always replace the bushing, unless the order reads "Do not replace bushings," and we have orders to show. The reason of that is they have an oversize wrist pin that they put in there; in other words, something special about the wrist pin, and the order frequently reads, "Do not change the bushing"; but unless it is ordered that way, we invariably change the bushing and put in a new one.

Q. Most of the rods which come in to you need a new bushing at the shank end of the rods, do they not? A. Yes.

Q. That is worn? A. Yes.

Q. It is necessary for the rod to properly perform its [224] function, that the bushing, as well

(Testimony of J. Leslie Morris.)

as the bearing, at the bearing end of the rod, be in first class shape? A. Yes.

Mr. Jewell: You may take the witness.

Redirect Examination

By Mr. Meserve:

Q. Mr. Morris, before rebabbitting connecting rods became a specialized service, how was a burned out connecting rod repaired, prior to 1910 or 1911?

Mr. Jewell: If the Court please, I object to that question. That was asked on direct examination. I haven't touched on it in cross examination.

The Court: He said it was done manually, by the garageman.

The Witness: Yes.

By Mr. Meserve:

Q. You referred, Mr. Morris, to a guarantee that you give or make in some form. Just what did you refer to, and what do you guarantee?

A. We guarantee the rebabbitting job; guarantee the babbitt against defective workmanship and material; that is, the labor and material that goes into the service of rebabbitting the connecting rod.

Q. And it has nothing to do with the rod itself?

A. No. There is no guarantee on the forging, the connecting rod itself, because we did not make that, and we [225] couldn't guarantee it.

Q. In discussing in your cross examination the matter of exchange with automotive or automobile dealers who sell new cars from their showroom

(Testimony of J. Leslie Morris.)

floors, of various types and models and makes, you referred to the fact that they also maintained an exchange of connecting rods. It is true, is it not, Mr. Morris, that practically each of these institutions maintain a repair shop? A. Yes.

Mr. Jewell: If the Court please, I object to the question as leading the witness.

Mr. Meserve: All right, I will withdraw it.

Q. Do each of the dealers in new cars, automotive dealers, maintain a repair shop for their cars and other cars?

Mr. Jewell: One moment, please. I object to the question upon the ground that it calls for a conclusion on his part as to whether or not the type of establishment maintained by the automobile manufacturer amounts to a repair shop.

The Court: I don't know whether it calls for a conclusion or not. I am assuming he is not going to answer a question that he cannot answer. Overruled.

The Witness: As a matter of fact, they all have repair shops. All of the larger dealers and distributors. I am speaking about people like Hoffman and Howard; they all [226] maintain a repair department, and they use connecting rods of their own make, and use connecting rods which are babbitted from many other makes, representing repairs on anything that comes into their shop to be repaired; used cars, and such.

By Mr. Meserve:

Q. Do you know it to be a fact, Mr. Morris, that

(Testimony of J. Leslie Morris.)

the larger or more principal dealers of the popular type of cars repair cars that they take in in exchange, whether of the same make or of other makes? A. They do.

Q. And in referring to the exchange with certain dealers, you are referring to the connecting rods used in that type of operation?

A. They bring rods over from any make of car, and ask for a babbitted one, or have them babbitted.

Q. You used the statement, Mr. Morris, in your cross examination, that very frequently you get back in your exchange operation one of your own rods. What did you mean by the statement "one of my own rods"?

A. Did I make that statement?

Q. I wrote it down and understood it to be that. Maybe I misunderstood it. You said very frequently, when you referred to your five per cent differential that you had to replace them in the exchange operation through jobbers, that very frequently you got back one of your own [227] rods. What did you mean by that statement?

A. I certainly didn't intend to, sir, because I wouldn't be able to recognize my own rod if it came back. May I have the question read?

Q. I will restate it again. As I understood it—it might not be important; I want to be certain.

A. I will be glad to help.

Q. Referring to the fact that at certain times, Mr. Morris, you may have to go to a jobber, or to

(Testimony of J. Leslie Morris.)

an automobile dealer and get a rod of a particular type that you want to serve some customer that may be asking for it, and you might not have it on hand, or he did not send you a rod to rebabbitt of that type—my understanding was that in response to the inquiry made in that particular you used the phrase, "we frequently have gotten back from the jobber one of our own rods."

A. I certainly want to correct it if I did, because I wouldn't be able to determine our own rod after it was babbitted unless, of course, it was not used. They frequently send them back, if they don't use them, and we give them credit for the babbitt and all. I don't recall having said that, but if I did, I want to correct it.

Q. I may be the one who is confused. I want to be sure it was myself, and not the record or the Court. If you did use that statement in your testimony, I assume you meant one of the rods that you had rebabbitted and not any [228] rods of your own make or manufacture.

A. Of course, that is what I would mean, yes.

Q. Now, during the time in question in this suit, Mr. Morris, did you have or maintain any warehouse or service? A. No.

Q. You have verified that?

The Court: Warehouse or service?

Mr. Meserve: Warehouse service.

The Court: What is the answer to that?

The Witness: No.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. You have verified that since yesterday by examining your records, is that correct?

A. That's correct.

Q. Referring, Mr. Morris, to Government's Exhibit A, can you explain in a little more particularity, the method of billing, taking Sheet 1, and the first item in Column 1 on Sheet 1, 3 in quantity. What does that refer to?

A. That C. E. Encell, Los Angeles, sent to us three No. 422 connecting rods to have rebabbitted, for which we charged him 70 cents each, $2.10.

Q. So that the 70 cents is the rebabbitting price?

A. This 70 cents is the price for each, yes.

Q. 70 in the column under the word "Rebab." on page 1 of Exhibit A, is the rebabbitting charge per item? [229] A. Per item, yes.

Q. And under "Extension" is the total?

A. The total.

Q. And in the instance which you are looking at on page 1 of Exhibit A of your invoice, there is no charge made at all for any rods?

A. No, those rods were received before we rebabbitted them.

Q. What is the difference, if any, on page 2 of Exhibit A?

A. That is an identical transaction.

Q. An identical transaction, except a different amount?

A. A different concern, yes. This is the Hartman Auto Parts Co., instead of Encell.

(Testimony of J. Leslie Morris.)

Q. And the quantity? A. Yes.

The Court The last one is the one that shows the difference?

The Witness: Yes, the last one.

By Mr. Meserve:

Q. This is the one I want to get, turning to page 3 of Exhibit A as it is now bound, and referring to the one to the Mission Auto Parts Company, is that right? A. That is correct.

Q. Explain the difference in that one as to the ones [230] you have previously explained.

A. This records the rebabbitting charge on one 0529 connecting rod, and the order indicates that we took a babbitted connecting rod and sent it in advance of receiving this. We made a deposit charge under "Forging" of $1.80, and the sum of the two is $2.85. We segregate that sum. Then when we issue a credit against this $1.80, the bookkeeper there can instantly determine that we have credited him with the proper amount.

Q. The $1.05 shown on page 3 was a babbitting charge? A. Yes. That remains, of course.

Q. On page 4, the explanation is the same?

A. The same as page 1.

The Court: Evidently when they were detached here, the order was changed.

Mr. Meserve: That was why I wanted to get the matter straight, your Honor.

Q. Reference was made, Mr. Morris, to an engine business that you are conducting, or have an

(Testimony of J. Leslie Morris.)

interest in in East Los Angeles. That has nothing to do with the J. Leslie Morris Company in any particular? A. No, it hasn't.

Q. The J. Leslie Morris Company does not have any ownership in it, directly or indirectly, except that you may be personally interested?

A. That is all. [231]

Q. When you refer to a mechanic in Saskatchewan that wants to do rebabbitting in the repair of connecting rods, there is nothing to prevent him from making or having made the molds and building and adapting machinery to do exactly what is done, without any permission from you whatsoever?

A. Nothing in the world, no.

Q. Except that he cannot use the words "Moroloy" unless you desire to let him?

A. That's right.

Q. But there is nothing to prevent him from getting any of the apparatus to do it? It is standard?

A. He could duplicate every bit of the equipment, if he saw fit.

Q. The only advantage to him is, you having had the dies and patterns made, you can furnish them cheaper? A. Yes.

Q. You have seen these two letters?

Mr. Jewell: Yes.

Mr. Meserve: You are not making any objection to their not being originals?

Mr. Jewell: No.

(Testimony of J. Leslie Morris.)

By Mr. Meserve:

Q. Mr. Morris, I show you copies of two letters that were transmitted to you from the deputy commissioner of Internal Revenue, dated March 25, 1938, and April 7, 1939, which letters are in substance the notice by the Government [232] of the refusal or declination to concede to your claim for a refund.

Do you remember receiving the originals of those letters? A. I do, yes.

Mr. Meserve: We will offer the copies of the two letters together, one of March 25, 1938, and of April 7, 1939, from the Commissioner of Internal Revenue, as Plaintiff's Exhibit next in order.

Mr. Jewell: No objection for not being originals.

The Clerk: Plaintiff's Exhibit 61 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 61.")

PLAINTIFF'S EXHIBIT No. 61

Mar 25 1938

MT:ST:JNG
Cl:S-61906

J. Leslie Morris Company, Inc.,
1361 South Hope Street,
Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of $500.00, representing tax paid under the provisions of section 606(c) of the Revenue Act of 1932.

(Testimony of J. Leslie Morris.)

The claim is based on the contention that rebabbitted connecting rods are not subject to the tax imposed by section 606(c) of the Revenue Act of 1932. In this connection you refer to the decision rendered in the case of the Hempy-Cooper Manufacturing Company vs. the United States and other decisions.

You are advised that this office has consistently held that rebabbitted connecting rods which are placed in stock are subject to the tax imposed by section 606(c) of the Revenue Act of 1932, when sold or exchanged, and that the allowance granted for the unserviceable article taken in trade should be included as a part of the sale price on which the tax is computed.

With respect to the decision rendered in the District Court for the Western District of Missouri, Western Division, in the case of the Hempy-Cooper Manufacturing Company vs. the United States, you are advised that the Bureau has taken the position that the decision is confined to that case and will not be considered as a precedent for other cases where similar facts are involved. The decisions cited are regarded as making no change in the position heretofore taken by the Bureau with respect to the taxability of rebabbitted connecting rods and will not be considered as a basis for the adjustment of claims filed by other taxpayers.

(Testimony of J. Leslie Morris.)

In view of the above, the claim is rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By (Signed) D. S. BLISS

Deputy Commissioner.

CC:Los Angeles, Cal.
CC:Files
JNG:MR

Apr 7 1939

MT:ST:JNG
Cls. S-65530 & 67956

J. Leslie Morris Company, Inc.,
1361 South Hope Street,
Los Angeles, California.

Gentlemen:

Reference is made to your claims for the refund of $500.00 and $500.00, representing tax paid under the provisions of section 606(c) of the Revenue Act of 1932 for the period June 1932 to August 1935, inclusive.

The claims are based on the contention that you are not a manufacturer of connecting rods. In this connection you refer to the decisions rendered in the cases of J. C. Skinner v. the U. S., Monteith Brothers Company v. the U. S., Hempy-Cooper Mfg. Company v. the U. S., and Pioneer Motor Bearing Company v. the U. S.

(Testimony of J. Leslie Morris.)

This office takes the position that a person who produces connecting rods, etc., from used or scrap materials or from both new and used material by a manufacturing process which produces serviceable products, is subject to the manufacturer's excise tax imposed by section 606(c) of the Revenue Act of 1932 on his sales thereof. Cases on this point which support the Bureau's position and decline to follow the J. C. Skinner Company, Monteith Brothers Company, Hempy-Cooper Mfg. Company and Pioneer Motor Bearing Company's decisions are Clawson and Bals Inc. v. Harrison, decided November 26, 1938 by the United States District Court for the Northern District of Illinois, and E. Edelmann and Company v. Harrison, decided March 16, 1939 by the same Court.

In view of the above the claims are rejected in full.

Respectfully,
GUY T. HELVERING,
Commissioner.

By:
(Signed) D. S. BLISS
Deputy Commissioner.

cc-Los Angeles, California.
cc-Files.
JNG:EPM

[Endorsed]: Plaintiff's Exhibit No. 61. Filed 5/28, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

(Testimony of J. Leslie Morris.)

Mr. Meserve: Mr. Jewell, I understood in our conference a moment ago that you would agree that the copies of the 1934 and 1935 capital stock tax returns of J. Leslie Morris Company, Inc., which I have in my hand are copies——

Mr. Jewell: I will not object to them upon the ground that they are not the best evidence.

Mr. Meserve: I call your attention to the one in 1935, that it doesn't even bear a copy of the signature.

Mr. Jewell: I will stipulate that the signature is the same as it is on the 1934.

Mr. Meserve: We offer in evidence the capital stock tax return of the Plaintiff corporation for the year 1934 as Plaintiff's Exhibit next in order. [233]

The Clerk: Plaintiff's Exhibit 62 in evidence.

Mr. Meserve: And the one of 1935 as Plaintiff's Exhibit 63, is that correct?

The Clerk: Plaintiff's Exhibit 63 in evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 62 and 63," respectively.)

PLAINTIFF'S EXHIBIT No. 62

1934 Return
of
Capital Stock Tax
For Year Ending June 30, 1934
Domestic Corporations

This return must be filed with the Collector of Internal Revenue for your district on or before

(Testimony of J. Leslie Morris.)

July 31, 1934, and the tax must be paid on or before that date.

1. Name—J. Leslie Morris Co., Inc.

2. Address—1361 So. Hope St., Los Angeles, Calif.

3. Name of parent company, if any— (District Filed—)

4. Name of subsidiary if any— No. shares held— (District filed—)

5. Nature of business in detail—Rebabbitting Connecting Rods.

6. Incorporated or organized in State of California.

[Endorsed]: Plaintiff's Exhibit No. 62. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 63

1935 Return

of

Capital Stock Tax

For Year Ending June 30, 1935

Domestic Corporations

This return must be filed with the Collector of Internal Revenue for your district on or before July 31, 1935, and the tax must be paid on or before that date.

1. Name—J. Leslie Morris Co., Inc.

(Testimony of J. Leslie Morris.)

2. Address—1361 So. Hope St., Los Angeles, Calif.

3. Name of parent company, if any— (District Filed—)

4. Name of subsidiary if any— No. shares held— (District filed—)

5. Nature of business in detail—Rebabbitting Connecting Rods.

6. Incorporated or organized in State of California.

[Endorsed]: Plaintiff's Exhibit No. 63. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Meserve: The same understanding or stipulation, Mr. Jewell, as to the State of California Bank and Franchise Tax Return for the calendar year 1935?

Mr. Jewell: No objection that it is not the best evidence.

Mr. Meserve: We will offer it as Plaintiff's Exhibit next in order.

The Clerk Plaintiff's Exhibit 64 in evidence.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 64.")

(Testimony of J. Leslie Morris.)

PLAINTIFF'S EXHIBIT No. 64

State of California

BANK AND CORPORATION FRANCHISE TAX RETURN

This return must be filed with the Franchise Tax Commissioner within two months and fifteen days after the close of the income year, together with Remittance Payable to State Treasurer.

(Space for name and address)

1. Exact corporate title—J. Leslie Morris Co., Inc. Corporate number— .

2. Mail Address—1361 So. Hope St., Los Angeles, Calif.

3. Date of Incorporation—Oct. 14, 1925.

4. Under laws of Calif.

5. Date began business in California—Oct. 14, 1925.

6. Kind of business—Motor Bearings

Copy Items 1 to 27 From Page 2, Corporation Federal Income Tax Return for the Year 1935, or the Fiscal Year Commencing.....and Ending.....

Item No.	Gross Income
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[Endorsed]: Plaintiff's Exhibit No. 64. Filed 5/29, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy Clerk.

Mr. Meserve: That is all.

(Testimony of J. Leslie Morris.)

Recross Examination

By Mr. Jewell:

Q. Mr. Morris, you stated that during the taxable period you had no warehouse service. What did you mean?

A. No warehouse service; that we did not have the warehouses you referred to yesterday during that period. Your question yesterday read: Do you have them? The answer was in the present tense.

Q. Are you referring to warehouses in Boston, Kansas [234] City, Minneapolis, New Orleans?

A. Yes.

Q. At that time you had no warehouse service of the type described?

A. Yes, I had a chance to look it up overnight.

Q. And all you did have were your own plants?

A. Those six that you mentioned.

Q. That's New York, Chicago, Columbus, Portland, Seattle, and Los Angeles? A. Yes.

Q. Mr. Morris, when you stated that you had a guarantee only as to materials and workmanship, you were referring to a guarantee that could be found where?

A. I don't think we ever mentioned it, sir. It is common practice for the industry to guarantee material and workmanship on any work that is performed. I am very sure we never advertised it, because it is not necessary. If we did, that is what it would cover. It is the practice of the repair industry to guarantee the materials they use, and the labor that is necessary to perform it.

(Testimony of J. Leslie Morris.)

Q. And to your knowledge, there is no such guarantee in any prospecti or advertising that you have?

A. I don't recall it at the moment.

Mr. Jewell: That is all.

Mr. Meserve: That is all from this witness.

The Court: I want to ask a question on the warehouse [235] feature counsel asked about this morning.

In these six units that have been mentioned here this morning, do you ship from Los Angeles to them any of these red boxes containing processed connecting rods?

The Witness: Yes, we do.

The Court: So then the only difference between the situation as it existed during the taxable period and that which later came up was that you had no warehouse in the sense that the receptacle did not do any processing itself, but simply received the product from you?

The Witness: May I get that clear?

The Court: Read it.

(The question referred to was read by the reporter, as follows:

"Q. So then the only difference between the situation as it existed during the taxable period and that which later came up was that you had no warehouse in the sense that the receptacle did not do any processing itself, but simply received the product from you?")

The Witness: Yes.

(Testimony of J. Leslie Morris.)

The Court: Received the product from your manufactory here in Los Angeles, or one of these other six manufactories you have testified to? I am not using "manufacture" in any technical sense at all.

The Witness: Yes; we did not have the six which I mentioned doing babbitting work right on the premises. We [236] had no warehouse stocks. That we did develop later on, after the taxable period.

The Court: In these establishments that were doing babbitting on the premises, was the product that they sold or distributed to the trade exclusively the product which you fabricated on the premises, or did they receive some of your stock which had been fabricated?

The Witness: No, fabricated on the premises.

The Court: They did not receive any stock from the Los Angeles stock?

The Witness: No. I might qualify that. I believe the New York branch toward the latter part of this taxable period did receive some shipments from Columbus, but that was all. Substantially they all did their own babbitting service.

The Court: Then was there any difference, essential difference, between the method of distribution through the warehouse than there was when you had no warehouse facilities?

The Witness: No. Do you mean the conditions today? We had no warehouses at all at that time,

(Testimony of J. Leslie Morris.)

other than in connecting with the babbitting establishment.

The Court: But you did have a warehouse in connection with the babbitting establishment?

The Witness: We had what might be termed a shipping room, with stock on the shelves.

The Court: I am differentiating between a shipping [237] room per se and a warehouse. By "warehouse," I mean this: A depository that receives a product from the place where it is manufactured or produced, and simply has it there for storage purposes to deliver as the occasion requires, as distinguished from the place where the product is actually produced.

The Witness: We had none during the taxable period.

The Court: But you did have, as I understand your testimony,—you did have, in connection with these branch organizations that you have testified to, these six, in addition to the tools that were present there with which to practice the method, a receptacle, or a place, where the product as made, or as processed in Los Angeles, or in other factories, was stored for the purposes of emergency.

The Witness: Yes, we sold it from that room, just as we have here. We have an accumulation of connecting rods babbitted, and the answer to your question, I think, is yes, we did. We had a shipping room, a stock room, with the stock in it, in connection with each one of these babbitting plants.

The Court: But wouldn't it be as I said? I might not make the distinction, but what I am try-

(Testimony of J. Leslie Morris.)

ing to ascertain is whether, regardless of what we call it, whether we call it a warehouse or a branch factory, or a branch processing place, or a machine shop or a garage, I am trying to ascertain whether there is any difference, insofar as the business [238] activity was concerned, when you used the facilities of a warehouse—what you call warehouse service,—I think counsel used that term.

The Witness: Yes.

The Court: The Court understands by warehouse service, a service where the connecting rod itself, and the parts that you process on it—the work isn't done there?

The Witness: No.

The Court: The instrumentality itself is there in a box and is stored in the warehouse?

The Witness: Yes.

The Court: Where does that instrumentality come from to the warehouse?

The Witness: It is shipped from the nearest plant.

The Court: During the taxable period did you have that same facility in connection with the machine shop that also practiced the method?

The Witness: Yes, sir.

The Court: So that the machine shop in Chicago, we will say, had a warehouse into which is stored connecting rods that had been serviced by units of the business organization other than Chicago, is that right?

(Testimony of J. Leslie Morris.)

The Witness: No, sir, because Chicago was the plant that had its own babbitting equipment, and they would have no rods in stock that they didn't babbitt right at Chicago.

The Court: Would that be true with all of the other [239] places?

The Witness: That would be true with all of the other places.

The Court: All of the six?

The Witness: All of the six that we spoke of, yes.

The Court: That is all.

Mr. Meserve: Mr. Jewell, would it be acceptable as a statement, by the Government, that connecting rods, as manufactured by the maker whose name appears on the rod, were subject to the tax provided by Section 606 of the Revenue Laws at the time of their original manufacture, if manufactured after the effective date of the Act?

Mr. Jewell: I would have no objections to the statement, but whether or not they were taxed is a matter I don't know.

The Court: Taxable.

Mr. Meserve: I said taxable; were subject to the tax. I am not asking the Government to stipulate that the manufacturer paid the tax, because they may have evaded it.

Mr. Jewell: I hesitate to state which particu-

lar taxing statute was used by the particular Collector as to General Motors, Ford, or any of the automobile manufacturers. I am not familiar with the levying of that type of tax, because I have never happened to have the occasion to have a case of that type.

The Court: It would not make any difference about the [240] activity of the Collector or Commissioner. He isn't the law. He is speaking about the effect of the law, of the statute.

Mr. Jewell: I am not the Court. I can't give a legal opinion about the matter.

The Court: He isn't asking you about that at all. He is trying to save a lot of time, which I think is perfectly proper, if he can be saved. Section 606 as it appeared at the applicable time, as I read it here, reading from Title 26 U. S. C. A., denominated Manufacturers' Excise Taxes; Act of 1932, Section 606. Tax on Automobiles, etc. "There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

> "(a) Automobile truck chassis and automobile truck bodies (including in both cases parts or accessories therefor sold or in connection therewith or with the sale thereof.), 2 percentum. A sale of an automobile truck shall, for the purposes of this sub-section, be considered to be a sale of the chassis and of the body."

The remaining portions of the Act, as they are found in this volume which I am reading from, relate to amendments which occurred subsequently. Is it conceded by both of you that the provision which I read was the selling provision that was in effect during the applicable taxable times involved in this case? [241]

Mr. Meserve: There is Section (c), Section 606.

The Court: Is (c) the same as the old Act, as it now is?

Mr. Jewell: I believe it was.

Mr. Meserve: That is correct.

The Court: That reads:

> "(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in Sub-Section (a) or (b), 2 percentum. For the purposes of this sub-section and Sub-Sections (a) and (b), sparkplugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in Sub-Section (a) or (b), shall be considered parts or accessories, for such articles, whether or not primarily adapted for such use. This sub-section shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this sub-section shall not apply to the case of sales of parts or accessories by the manufacturer, producer, or im-

porter to a manufacturer or producer of any of the articles enumerated in Sub-Section (a) or (b). If any such parts or accessories are resold [242] by such vendee otherwise then on or in connection with, or with the sale of, an article enumerated in Sub-Section (a) or (b), and maunfactured or produced by such vendee, then for the purposes of this section, the vendee shall be considered the manufacturer or producer of the parts or accessories so resold."

Now, is it conceded that these three sections in the statute, as they appear in this volume, were the statutes that were in effect at the time of the applicable taxable period?

Mr. Jewell: That's conceded.

Mr. Meserve: That is conceded.

The Court: What is the other part of your request for a stipulation?

Mr. Meserve: That the tax on connecting rods that were used in connection with Plaintiff's business, that bore the name of a manufacturer, either by identification number or name, were subject to the tax as to the rods that were manufactured, after the effective date of the Act, my point being, in explanation, that the connecting rods were taxable. We don't know whether the tax was paid that was issued. We are not asking the Government to say that. They may have evaded it. I have talked this over with Mr. Jewell, but we want it understood that there was tax collectible and levied on that

connecting rod, as an automotive part, [243] by the manufacturer thereof before it came in to us for rebabbitting by the Plaintiff corporation, and that connecting rod had actually been manufactured after 1932, or the effective date of the Act. Do I make myself clear?

The Court: I understand what you say.

Mr. Jewell: I have no right to make any such concession. I don't think it would be much of a concession. All he is asking me for is a legal opinion by way of stipulation or concession. I assume that they were taxed, and are taxable or were taxable.

The Court: I think you are correct. I think it is a legal conclusion.

Mr. Jewell: Furthermore, it has no materiality unless it was taxed. Merely being taxable is not sufficient.

Mr. Meserve: If we accept it as a legal conclusion, I am perfectly satisfied.

The Court: You can accept this from the Court, that it was taxable.

Mr. Meserve: Thank you.

Mr. Jewell: But not from counsel.

Mr. Meserve: Plaintiff rests.

The Court: I want it understood, in connection with that last statement, so that both of you will not be misled, that the Court is referring to what it calls new connecting rods and is not referring to reconditioned or reprocessed or later assembled connecting rods; but it is referring to the [244] instrumentality as it either comes in the vehicle or as it comes separate and apart from

the vehicle, from the manufacturer to its dealers, whoever they may be, or to the consumer, whoever he may be.

Mr. Meserve: That is correct. That's the way we understand it.

The Court: All right.

(Discussion as to time of argument and briefs, omitted from transcript.)

The Court: There is only one point which Mr. Morris discussed, where he felt he had not expressed himself as Mr. Meserve thought he had. I think that should be cleared up, and the record transcribed as to that.

Mr. Meserve: I think it has been cleared up by the correction.

The Court: It has been cleared up so far as Mr. Morris is concerned. It has not been cleared up so far as the Court is concerned. Over the noon hour you probably can get the reporter to give you the portion of the testimony—either read his notes to you, or have them transcribed so that they can be used. I think we will have the oral argument this afternoon for such time as I feel I should have, with the limitation by the Court as to what is reasonable. I want to say this now, so that you can marshal your arguments within the scope that is in the Court's mind: Of course, the burden is on the taxpayer in this case, because [245] he has brought the action and he must show, so far as the factual situation is concerned, by a preponderance of the evidence, that he was not a manufacturer or producer within the meaning of the statute which has

been read. On the other hand, if there is a question where factually there is a very close balance, the Court is going to give the taxpayer the benefit of it. I don't know whether that question will arise or not, but those are two questions of fact that you gentlemen should address yourselves to. The legal situation can be argued as you desire, with particular attention paid to these conflicting decisions that have been cited by the Commissioner. We will meet at 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same date.)

[246]

Los Angeles, California
Wednesday, May 29, 1940
2:00 O'Clock P.M.

Mr. Meserve: With your Honor's permission, I would like to have the case reopened on behalf of the plaintiff corporation to clear one matter we discussed with reference to the use of the phrase "Your own rods," as we were discussing this morning.

The Court: No objection.

Mr. Jewell: No objection.

LESLIE J. MORRIS

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination

By Mr. Meserve:

Q. Mr. Morris, on cross examination you were asked the following question by Mr. Jewell on be-

(Testimony of J. Leslie Morris.)

half of the Government: "Q. Have any dealers ever sent you any rebabbitted rods?"

And your answer was: "A. Yes, sometimes they have sent some of our own, which we have rebabbitted for them."

I attempted this morning to have you inform us what you meant by that phrase, "some of our own." Will you explain that answer?

A. Yes, it is perfectly clear to me now. I meant [247] when we went over to purchase a connecting rod to send to some person who had bought them from us, and we did not have them in our stock, that they would quite frequently sell to me a connecting rod which I had rebabbitted for them just previously, or possibly a month previous or a week. That is what I meant. I did not mean they were rods I had ever furnished them. They had sent them to me to rebabbitt and they took them back, of course, when I rebabbitted them; and when I needed it for some other customer, they would send it back. I have heard the clerk say, "You can't complain about the rebabbitting on these rods, because you did it yourself."

Q. What price did you pay on that occasion?

A. Paid exactly the same price as if taken out of stock, which had come from the factory; in other words, I paid the retail price on the connecting rod, because I was buying from them; both the connecting rod itself, and the babbitting service.

The Court: You paid to them your list price?

The Witness: Yes, our list price, because that was just about the same as theirs.

(Testimony of J. Leslie Morris.)

The Court: Just about the same?

The Witness: I paid their list price, not ours for the sale of the connecting rod.

The Court: How did their list price compare with yours?

The Witness: About the same. I am speaking of the [248] complete unit. That would be our service for the babbitting, and a deposit for the connecting rod; those two added would be just about what you would pay the agents for the connecting rod.

By Mr. Meserve:

Q. Referring further, Mr. Morris, to the same examination, this question was asked:

"Q. That occurred on occasions when you wanted to purchase rods to keep your supply built up to facilitate your exchange service?"

And your answer was:

"A. That is right.

"Q. They have shipped you one of your own rods?"

In using that same phrase, "one of your own rods," you had the same reference to that same arrangement you have just now explained?

A. One which we have babbitted.

The Court: That was the question.

Mr. Meserve: The answer was "A. They have shipped us a great many of them. We have gotten them back many times."

The Witness: I mean the rods that we have babbitted for them they sold to us.

The Court: That is all. [249]

(Testimony of J. Leslie Morris.)

Cross Examination

By Mr. Jewell:

Q. You indicated that the rods which you obtained in that fashion from the dealer were rods which they had sent to you, and you had rebabbitted and sent them back. You don't mean to imply that those were necessarily the same rods which they sent to you, but they were rods which they had merely, perhaps, received back in place of the rods which they had sent to you of the same size.

The Court: That is too involved. Can't you simplify that?

The Witness: It would mean the same thing.

By Mr. Jewell:

Q. You implied there that the rods that you have purchased from the dealer were rods which they had sent to you, which you had rebabbitted and sent back? A. Yes.

Q. Did you mean exactly that?

A. For this reason, to visualize the transaction as it would happen: The rods which we had to get from them would be invariably later model rods, rods that were hard to get; that they had not sold yet. In fact, I would send over an order for two sets, and they would give me one, and would telephone and say, "Morris, we have only two. We can't let you have them. We need one." But they would send that one over willingly, to have me babbitt that, and [250] put it back in stock.

Q. The connecting rods you would have occa-

(Testimony of J. Leslie Morris.)

sion to purchase would fall within the 10 per cent?

A. Yes. If it was a rod which I had plenty of, I would probably not be buying over there. I couldn't determine whether I had babbitted them myself or not.

Mr. Jewell: That is all.

The Court: Is that all, gentlemen?

Mr. Meserve: That is all.

(Witness excused.)

[Endorsed]: Filed Mar. 25, 1941. [251]

[Endorsed]: No. 9746. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. J. Leslie Morris Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 17, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9746

(District Court—No. 433-M)

UNITED STATES OF AMERICA,
Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC.,
Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Pursuant to Rule 19, subdivision 6 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, the following is the statement of points upon which appellant intends to rely on appeal:

I.

The court erred in determining that the sales of connecting rods by the appellee, during the taxable period involved herein, were not sales of automobile parts or accessories by a manufacturer within the purview of Section 606 (c) of the Revenue Act of 1932.

Dated: February 5, 1941.

WILLIAM FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.

ARMOND MONROE JEWELL,
Assistant United States Attorney.
By ARMOND MONROE JEWELL,

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE MATERIAL PORTIONS OF THE RECORD ON APPEAL WHICH ARE, THEREFORE, TO BE PRINTED.

Pursuant to the provisions of Rule 19, Subdivision 6, of the Rules of the United States Circuit Court Of Appeals For The Ninth Circuit, Appellant hereby designates those portions of the Record On Appeal in above entitled cause which it desires printed in the Transcript Of Record, as follows:

1. Complaint (R. pp. 2 to 15, inclusive)
2. Answer (R. pp. 17 to 25, inclusive)
3. Substitution of Attorneys (R. pp. 27 and 28)
4. Order for Judgment (R. p. 32)
5. Conclusions of the Court (R. pp. 33 to 36, inclusive)
6. Findings of Fact, and Conclusions of Law (R. pp. 37 to 55, inclusive)
7. Judgment (R. p. 56)
8. Notice of Apeal (R. p 57)

9. Orders Extending Time To File Record And Docket Cause On Appeal (R. pp. 58 and 59)

10. Order Permitting Originals To Be Sent To Circuit Court In Lieu Of Copies (R. p. 60)

11. Designation of Record On Appeal (R. pp. 61 and 62)

12. Plaintiff's Exhibits 1 to 32, inclusive

Note: Please print these exhibits in the same manner as in the case of United States of America vs. Armature Exchange Inc., No. 9469.

13. Plaintiff's Exhibit 43, print: one invoice (the second from the top).

14. Plaintiff's Exhibit 45, print: all of the top page; and first inside page down to and including the line commencing with Stock No. 25; and the statement at the bottom of the last page.

15. Plaintiff's Exhibit 47, print: all of the top page.

16. Plaintiff's Exhibit 49, print: all of the outside of the top cover; all of the inside of the top cover; and all of both sides of the next page which follows the top cover; and "Page 1" down to and including the line containing the listings opposite the name "Ajax"; also the inside of the back cover.

17. Plaintiff's Exhibit 50, print: picture of box showing the label on its end.

18. Plaintiff's Exhibit 55, print: the heading at

the top merely down to and including the line opposite the word "Assets".

19. Plaintiff's Exhibit 61, print: all.

20. Plaintiff's Exhibit 62, print: top page down only to and including the line opposite Item 6.

21. Plaintiff's Exhibit 63, print: top page down only to and including the line opposite Item 6.

22. Plaintiff's Exhibit 64, print: top of the first page of the printed form down to the words "Gross Income" which are printed in the center of the page in large type.

23. Defendant's Exhibit A, print: the invoice that is second from the top.

24. Defendant's Exhibit B, print: down through paragraph "Second".

25. Defendant's Exhibit C, print: top page down only through the line opposite Item 6.

26. Defendant's Exhibit D, print: top page of printed form down only to the words "Gross Income" which are printed in the center of the page in large type.

27. Defendant's Exhibit E, print: top page of printed form down only to the words "Gross Income" which are printed in the center of the page in large type.

28. Defendant's Exhibit F, print: top page of printed form down only to the words "Gross Income" which are printed in the center of the page in large type.

29. All of the Reporter's Transcript, Excepting and Omitting the following portions: p. 70, l. 13 to p. 84, l. 5; p. 85, l. 20 to p. 97, l. 11; p. 98, l. 10 to p 102, l. 1; p. 103, l. 8 to p. 105, l. 21; p. 189, ls. 13 and 14.

Dated: February 5, 1941.

WILLIAM FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
ARMOND MONROE JEWELL,
Assistant United States Attorney.
By ARMOND MONROE JEWELL.

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF MATERIAL PORTION OF THE RECORD TO BE PRINTED IN ADDITION TO PORTION OF RECORD DESIGNATED BY APPELLANT.

Pursuant to the provisions of Rule 19, Subdivision 6, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, appellee hereby designates that portion of the record on appeal in the above entitled cause which it desires printed in the transcript of record in addition to the portions of the record designated by appellant, as follows:

1. That portion of the Reporter's Transcript, to wit: p. 85, l. 20 to p. 97, l. 11, said portion of the Reporter's Transcript having been omitted by appellant in its designation. (see l. 20, p. 3, appellant's designation)

Dated: February 24, 1941.

DARIUS JOHNSON AND
MESERVE, MUMPER &
HUGHES.

By E. AVERY CRARY
Attorneys for Appellees.

[Endorsed]: Filed Feb. 25, 1941. Paul P. O'Brien, Clerk.